No. 97-391-CFH Title: Arthur Calderon, Warden, et al., Petitioners
v.
CAPITAL CASE Troy A. Ashmus, etc.

Docketed: Court: United States Court of Appeals for
September 5, 1997 the Ninth Circuit

See also:
97-5623

Entry	Date	Proceedings and Orders
	Sep 5 1997	Petition for writ of certiorari filed. (Response due November 4, 1997)
	Sep 5 1997	Appendix of petitioner filed.
	Sep 24 1997	Order extending time to file response to petition until November 4, 1997.
	Nov 4 1997	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Nov 4 1997	Brief of respondent Troy Ashmus, etc. in opposition filed.
	Nov 4 1997	Motion of respondent for leave to proceed in forma pauperis filed.
	Nov 13 1997	Reply brief of petitioners Arthur Calderon, Warden, et al. filed.
	Nov 19 1997	DISTRIBUTED. December 5, 1997
	Dec 5 1997	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Dec 5 1997	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Dec 5 1997	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. The brief of petitioners is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Friday, January 16, 1998. The brief of respondents is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Friday, February 13, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 13, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 24, 1998. **********
	Jan 15 1998	Joint appendix filed.
	Jan 15 1998	Brief of petitioners Arthur Calderon, Warden, et al. filed.
	Jan 16 1998	Brief amici curiae of Maryland, et al. filed.
	Feb 2 1998	Record filed.
	Feb 11 1998	CIRCULATED.
	Feb 12 1998	Order extending time to file brief of respondent on the merits until February 17, 1998.
	Feb 17 1998	Brief of respondent Troy Ashmus filed.
	Mar 10 1998	Reply brief of petitioners Calderon, Warden, et al. filed.
	Mar 24 1998	ARGUED.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioner*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

A California death row inmate brought a class action suit against state officials, challenging their view that California's mechanism for appointing and compensating state collateral counsel in capital cases satisfies the criteria established in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Without addressing the Eleventh Amendment, the district court allowed the suit, concluded that California's mechanism does not qualify under Chapter 154, and issued a statewide injunction barring California officials from contending otherwise in any proceeding involving any class member. Disagreeing with *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), *cert. pending* No. 97-5623, the Ninth Circuit concluded that the inmate's suit was authorized under the *Ex Parte Young* doctrine because it "identif[ied] a continuing or impending violation of federal law" by state officials, and affirmed. The questions presented are:

1. Does the Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in the regular course of habeas litigation?

2. Does an injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute an impermissible viewpoint-specific prior restraint on lawful advocacy?

3. Does California's mechanism for appointment and compensation of collateral capital counsel satisfy the criteria established by Congress in Chapter 154?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual on behalf of himself and all others similarly situated, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arthur Calderon, Teena Farmon, James H. Gomez, and Daniel E. Lungren respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals, App. 1a-24a, is reported at ___ F.3d ___, 1997 WL 469527 (CA9 1997). The opinion of the district court, App. 25a-80a, is reported at 935 F. Supp. 1048 (N.D. Cal. 1996)

JURISDICTION

The court of appeals entered its judgment on August 18, 1997. App. 1a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

1. U.S. Const., amend. XI
2. 28 U.S.C. § 2261
3. 28 U.S.C. § 2265
4. Cal. Gov't Code § 68511.5 (West Supp. 1997)
5. Cal. Gov't Code § 68070 (West Supp. 1997)
6. Cal. Rules of Court, rule 76.5 (West 1996)
7. Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20 (West 1996)
8. Cal. Pen. Code § 1241 (West 1982)
9. Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Court Rules Vol. 23, pt. 3 (West 1996 & Supp. 1997)
10. Cal. Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants, Court Rules Vol. 23, pt. 3 (West 1996)
11. Cal. Sup. Ct. Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings, Court Rules Vol. 23, pt. 3 (West 1966 & Supp. 1997)

STATEMENT OF THE CASE

Enacted as Title I, section 107, of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), new Chapter 154 of Title 28 institutes adjudicative reforms for federal habeas corpus review of capital judgments from states that establish qualifying mechanisms for appointing and compensating state collateral counsel. Seeking to block application of those reforms to the federal judiciary's review of California capital judgments, a death row inmate brought this class action against state officials for preemptive declaratory and injunctive relief. Filed the same day the AEDPA was signed into law, the inmate's complaint styled this suit a "civil rights" action "brought pursuant to 42 U.S.C. § 1983," and purported to invoke the jurisdiction of the district court under 28 U.S.C. sections 1343(a)(3) and (4) (civil rights) and 1331 (federal question); equitable relief was sought pursuant to 28 U.S.C. sections 1343(a)(3), 2201, and 2202.

Without addressing state officials' claim of Eleventh Amendment immunity from such a suit, the district court allowed it go forward, concluded that California's collateral review procedures do not include a qualifying mechanism under Chapter 154, and issued a statewide injunction barring state officials from advocating otherwise in any legal proceedings involving death row inmates. In a 2-1 decision, the Ninth Circuit affirmed, rejecting the Eleventh Amendment immunity claim with a finding that the inmates, by challenging the state's "announced intention" to urge application of Chapter 154 in the federal courts, had "identif[ied] a continuing or impending violation of federal law" by state officials. In so holding, the Ninth Circuit created an "inter-circuit conflict of decision in a matter of national concern." App. 24a (Beezer, C.J., diss.) (citing *Booth v. Maryland*, 112 F.3d 139 (CA4 1997)).

A. Chapter 154

Chapter 154 implements wide-ranging reforms relating to federal habeas corpus review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy,* 117 S.Ct. 2059, 2063 (1997). A qualifying mechanism can be either "unitary" or "nonunitary." The latter entails appointments of counsel to provide representation "in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences *have been upheld* on direct appeal to the court of last resort in the State or have otherwise *become final* for State law purposes." 28 U.S.C. § 2261; App. 82a (emphasis added). The former, which is the model in use in California, provides appointments for representation in the state's "*unitary* review procedure," defined by Congress as "a State procedure that authorizes a person under sentence of death to raise, *in the course of direct review* of the judgment, such claims as could be raised on collateral attack." *Id.* § 2265; App. 84a (emphases added).

In order for a state's unitary review procedure to qualify under Chapter 154, it must "establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel . . ." incurred in connection with collateral claims, and such rule of court or statute must "provide standards of competency for the appointment of such counsel." Further, the state's mechanism must include an "offer of counsel" and "entry of an order" either (1) providing appointment "upon a finding that the prisoner is indigent and has accepted the offer," or (2) finding that the prisoner competently rejected the state's offer, or (3) denying appointment upon a finding that the prisoner is not indigent. Finally, no

counsel appointed to provide representation in connection with collateral claims shall have previously represented the prisoner at trial (in a unitary state) or either at trial or on direct appeal (in a nonunitary state), "unless the prisoner and counsel expressly request continued representation." 28 U.S.C. §§ 2261, 2265; App. 82a-85a.[1]

B. The Components and Origins of California's Unitary Mechanism

Article 6, section 6, of the California Constitution empowers the California Judicial Council to "adopt rules for court administration, practice and procedure and perform other functions prescribed by statute." Cal. Const., art. 6, § 6 (West Supp. 1997). In addition, under California law, "*Every court* may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." Cal. Gov't. Code § 68070 (West Supp. 1997); App. 87a.

California Government Code section 68511.5 specifically directs the State Judicial Council to

> adopt rules of court regulating the selection of appointed counsel, other than the State Public

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1. The criteria by which unitary and nonunitary mechanisms will qualify are otherwise substantially identical, the only other differences being these: (1) whereas the offer of counsel in a unitary state occurs "following trial" (since the ensuing state appellate court review will be "unitary"), the offer of collateral counsel in a nonunitary state is extended after the prisoner's capital conviction and sentence is affirmed on direct appeal (because only then will any collateral review phase ordinarily begin), *compare* § 2261(b) *with* § 2265(b) & (c); and (2) whereas a qualifying mechanism in a unitary state must be established "by rule of its court of last resort or by statute," a nonunitary state's mechanism can be established by either of those devices or, alternatively, "by another agency authorized by State law," *compare* § 2261(b) with § 2265(a).

> Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts. In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office the State Public Defender.

Cal. Gov't. Code § 68511.5 (West Supp. 1997); App. 86a.

Accordingly, Rule 76.5 of the California Rules of Court (effective January 1, 1985), directs that "[e]ach appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender." Cal. Rules of Court, rule 76.5 (West 1996); App. 86a. Toward that end, the rule further directs that appointments be made from lists, the court's compilation of which shall be accomplished by "consider[ing] the guidelines in section 20 of the Standards of Judicial Administration Recommended by the Judicial Council . . . ", *id.*, a provision which itself cross-references Rule 76.5 and went into effect the same day. *See* Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20, Court Rules Vol. 23, pt. 2, at 680 (West 1996) (historical note). All such Standards of Judicial Administration have been adopted by the Judicial Council "[u]nder its authority granted by Article VI, section 6, of the Constitution . . . ." and "[t]hey are published in Division I of the Appendix to the California Rules of Court." Cal. Rules of Court,

Introductory Statement, Court Rules Vol 23, pt. 1, at 4 (West 1996). Subdivision (c) of Section 20 of the Standards states:

> **(c) [Supreme Court]** The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for a review by the court of administrator.

Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20, Court Rules Vol. 23, pt. 2, at 680 (West 1996); App. 91a.[2/]

Effective June 6, 1989, the California Supreme Court's published "Policies Regarding Cases Arising From Judgments of Death" explicitly state that "Appellate

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2. Consistent with the provisions of Chapter 154, all appointments in California capital cases are made by formal order. Since April 24, 1991, all orders have expressly noted that the appointment extends to representation in any related habeas proceedings. A copy of the appointment order is mailed to the assigned attorney, along with other information to assist counsel in the preparation of interim payment requests and related materials. Since February 18, 1986, no attorney who provided representation at a capital trial in California has been appointed to represent the same inmate in post-conviction proceedings. Dist. Ct. Clerk's Rec. No. (hereafter "CR") 25; Excerpt of Rec. on Appeal (hereafter "ER") 54-55.

counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus," and the Policies direct that such petitions "be filed without substantial delay." Cal. Sup. Ct. Policies Regarding Cases Arising From Judgments of Death Policy 3.1-1, Court Rules Vol. 23, pt.3 (West Supp. 1997); App. 93a-98a; *see also In re Clark*, 5 Cal.4th 750, 782-787, 21 Cal.Rptr.2d 509, 530-533, 855 P.2d 729, 750-753 (1993).

Every counsel appointed by a California appellate court to "any appeal or proceeding" is statutorily guaranteed "a reasonable sum for compensation and necessary expenses." Cal. Pen. Code § 1241 (West 1982); App. 92a. This assurance is supplemented in capital cases by comprehensive compensation standards and exhaustive guidelines for payment under a choice of rate schedules, all of which explicitly address the funding of costs related to the investigation and presentation of habeas claims. Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, *supra*, Policy 3.2; Cal. Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants, Guidelines II. A.; II.*J*.3; III., Court Rules Vol. 23, pt. 3, at 147-155 (West 1996); Cal. Sup. Ct. Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings, Guidelines 1-4, 9, Court Rules Vol. 23, pt. 3, at 156-160 (West 1996); App. 93a-120a.

C. Proceedings Below

Troy A. Ashmus, whose state capital judgment and sentence were affirmed in 1991, *People v. Ashmus*, 54 Cal.3d 932, 2 Cal.Rptr.2d 112, 820 P.2d 214 (1991), initiated these federal proceedings as a civil rights suit after state officials publicly "indicated their belief" that Chapter 154 would govern federal review of California

death judgments. CR 1 at 2; CR 6 at 4-5. Fearing "uncertainty about the application of Chapter 154" in California, CR 1 at 3, and anticipating that state officials would, unless restrained, argue its applicability before federal judges, Ashmus characterized state officials' expected conduct as a form of illegal "enforcement" actionable under *Ex Parte Young*, 209 U.S. 123 (1908). CR 1 at 12-13; CR 18 at 4-5; CR 30 at 4-8.[3]

The district court granted the requested relief. While recognizing that "Congress . . . has entrusted *to the federal judiciary* [rather than state officials] the responsibility and obligation for determining when Chapter 154 applies to a given state," the court concluded that California death row inmates "will be forced to forfeit their rights under Chapter 153 as a direct result of the *uncertainty* over Chapter 154's applicability created by defendants' *assertions*." App. 32a, 33a (emphases added). While also acknowledging that the propriety of the inmates' resort to the provisions of 42 U.S.C. § 1983 presented "a difficult issue of first impression," the resolution of which "is not entirely free from doubt," *id*. at 44a-48a, 78a, the court refused to dismiss the complaint, CR 48 at 17; ER 72, but "independent[ly]" and "addition[ally]" conferred them relief under 28 U.S.C. §§ 2201-2202, reasoning that the inmates "fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act" and also "within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapter 153 and 154." App. at 44a-48a, 78a. The court did not address whether the Eleventh

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3. Though filed as class action on behalf of every death row inmate in California, the complaint identified just one of the inmates by name—Mr. Ashmus, whose counsel filed a notice "relating" the suit, for purposes of judicial assignment, *see* No. Dist. Cal. Local R. 3-12, to his nascent habeas proceeding, *Ashmus v. Calderon*, No. C-93-0594-TEH (petition filed Apr. 17, 1997). CR 9.

Amendment barred the inmates' coercive suit against state officials; however, in response to state officials' observation that questions concerning the application of the new habeas reforms should properly be presented and resolved in the course of any habeas proceeding in which such questions arise, the court declared that it felt "required to resolve the question as it in fact was presented, not as defendants wish it had been presented." *Id.* at 60a.

Rejecting state officials' constitutional objections to having their adversarial activities enjoined, the district court acknowledged that state officials "certainly have a fundamental First Amendment right to express their views" on the applicability of Chapter 154, but suggested this right must yield because "the *manner* in which they have" expressed their views has placed death row inmates "in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." App. 35a (emphasis added). Notwithstanding its further acknowledgment that barring state officials on a statewide basis from advocating their views on the applicability of Chapter 154 "may constrain the ability of other co-equal district court judges to decide the issue differently," the court felt itself "obligated" to act as it did. *Id.* at 59a-60a.

Finally, the court determined that California's procedures fail to satisfy the criteria prescribed by Chapter 154 in the following five respects: First, the court concluded that the California's Supreme Court's refusal to expend public funds for "fishing expeditions" to uncover "*any*" basis for a collateral claim, though a "sensible" limitation, is "objectively deficient" because it restricts appointed counsel to pursuing only those collateral issues "that are knowable by reference to the four corners of the appellate record." App. 65a-67a. Second, because California does not confer the benefit of appointed

counsel "immediate[ly]"—as evidenced by the fact that there are many death row inmates in California who have requested an appointment but not yet received one and will likely wait "some time" before they do—the district court determined that California does not make its appointments "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.* at 75a. Third, the court found that California has no qualifying competency standards for counsel because its standards appear in section 20 of the Standards of Judicial Administration and that provision is neither a "rule of court" nor a "statute." *Id.* at 69a-71a. Fourth, the court concluded that section 20's standards cannot qualify California under Chapter 154 because they are not "binding or mandatory." *Id.* at 71a-73a. Finally, the standards were deemed deficient because they make "no mention of original habeas proceedings and . . . require[] no minimum experience whatsoever in habeas proceedings." *Id.* at 73a-74a.

By a 2-1 decision the Ninth Circuit "reluctant[ly]" rejected the last of these grounds on which the district court based its ruling, App. 19a, but agreed with the remaining points and affirmed. *Id.* at 18a-20a, 22a. As a threshold matter, the majority declined to follow the Fourth Circuit's recent decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), whose teaching would have required dismissal of the inmates' suit under the Eleventh Amendment; instead, the court determined that the inmates' action "falls within the *Ex Parte Young* exception, and the Eleventh Amendment does not bar this suit" because the inmates had "identifi[ed] a continuing or impending violation of federal law," as follows:

> [The inmates] have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their

> right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to assistance of counsel, pursuant to 21 U.S.C. § 848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) "grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any *federal* post conviction proceeding." *McFarland v. Scott*, 114 S. Ct. 2568, 2571 (1994) (internal quotations and footnote omitted).

App. 9a-10a (emphasis added). After observing that many death row inmates in California have long awaited appointment of *state* counsel, the court concluded that

> By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.
>
> Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to restrictive federal review. The downside of

> choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great. If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel. In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court.

Id. at 10a-11a; *see also id.* at 20a ("California cannot take advantage of the six-months limitations period when it takes years to appoint counsel").[4]

The Ninth Circuit did not find that questions concerning the applicability of Chapter 154 would escape resolution *unless* it allowed the prisoners' lawsuit to go forward; to the contrary, it acknowledged that the prisoners could test their understanding of the law against state officials' competing assertions by litigating those disputes in the course of any habeas proceedings in which they arise. Thus, under these circumstances, the court saw "little, if any" difference in "impact on the State's sovereign interests" between, on the one hand, having the state adjudicate the issue by motion in habeas proceedings and, on the other hand, forcing state officials to defend their conduct against the prisoners' coercive suit. App. 12a. Indeed, the latter course serves the interests of "efficiency

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4. Construing the inmates' complaint to plead a free-standing "cause of action" for declaratory judgment, which it believed to be authorized under *Ex Parte Young*, the Ninth Circuit saw no need to "address California's argument relating to the merits of Ashmus's section 1983 claim" App. 14a, 21a; *see* CR 50 (state's motion to dismiss complaint under Fed. R. Civ. P. 12(b)); CR 40 (order denying motion to dismiss); *see also* App. 8a (referring to "other claims still pending before the district court").

and fairness," in the Ninth Circuit's view, because it reduces delay, saves tax dollars, and eliminates any potential that "divergent district court opinions could occur." *Id.* at 13a.

Finally, the Ninth Circuit dismissed state officials' contention that the district court's injunction constituted an impermissible content-based, viewpoint-specific prior restraint on their right and duty to advocate on behalf of the state's interest in protecting its judgments from collateral attack. According to the Ninth Circuit,

> The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements.

App. 21a.[5]

Judge Beezer dissented, having been "persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense." App. 23a. Like the inmate suit in *Booth*,

> ". . . this action fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a chapter 154 defense, nor the

5. As "clarified" by the Ninth Circuit, the injunction bars California officials "from asserting in any state or federal court that it qualifies" for Chapter 154's reforms "*under the current state of California law.*" "[D]epending upon future events," state officials could seek modification from the district court. App. 3a, 21a, 21a.

> announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either. . . ."

Id. at 23a (quoting *Booth*, 112 F.3d at 144 (citing *Green v. Mansour*, 474 U.S. 64, 74 (1985))). As Judge Beezer noted, the majority's refusal to follow *Booth* creates an "inter-circuit conflict of decision in a matter of national concern." *Id.* at 24a.

REASONS FOR GRANTING THE WRIT

Introduction and Summary

The Ninth Circuit's decision exposing state officials to suit and coercive sanctions for advancing assertedly incorrect legal arguments represents an unprecedented encroachment on the Eleventh Amendment, and conflicts directly with the Fourth Circuit's unanimous decision in *Booth*. Although the resulting conflict will invite revolutionary departures from accepted methods for resolving procedural disputes that arise in the course of *any* litigation to which a state or its officers are, or might become, a party, the need for guidance from this Court is most acute in the precise context presented by this case and *Booth*: construction of Chapter 154, a measure passed by "a Congress intent on expediting capital habeas cases," *Lindh v. Murphy*, 117 S.Ct. at 2065, and "concern[ed] with the perceived acquiescence in capital defendants' dilatory tactics by some federal courts . . .," *id.* at 2069 (Rehnquist, C.J., diss.). *See Booth v. Maryland*, No. 97-5623.

States that have enacted death penalty laws are keenly interested in seeing these long-awaited reforms implemented, with most death row inmates no less resolved to see the reforms blocked. Thus, *both* parties to federal habeas proceedings urgently need to know the proper method and procedure for adjudicating the questions that divide them. The course charted for capital prisoners by the Ninth Circuit, however, not only violates states' immunity under the Eleventh Amendment, but virtually ensures that Congress's intent in enacting Chapter 154 will be thwarted if not wholly defeated—and not just within California and throughout the Ninth Circuit, but around the country.

The Ninth Circuit has determined that "under the current state of California law," the state does not qualify under Chapter 154 because it fails to make "timely" appointments of state counsel; Chapter 154, however, prescribes no time limits within which such appointments must be made as a precondition to its application. Likewise, California's carefully fashioned competency standards have been deemed insufficient because they are not "binding or mandatory," yet no such condition is prescribed in Chapter 154 either. The Ninth Circuit similarly misstates what constitutes a "rule of court" both in Congress's understanding and as a matter of California law, and misconstrues the state law standard governing the California Supreme Court's disbursement of public funds for the investigation of collateral claims.

To be sure, so long as most federal courts outside the Ninth Circuit follow *Booth* and allow other officials to express their views on the implications of Chapter 154 for their states, a body of interpretive decisions will emerge over time revealing the extent to which the Ninth Circuit has misstated Chapter 154's terms. The extent to which the Ninth Circuit misapprehends state law should also appear, albeit not until the state supreme court next has

occasion to address the same subjects. But enlightenment from those sources will forever be lost on the Ninth Circuit and any other court that might embrace its erroneous views, for those courts—by enjoining state officials from presenting or even preserving the issue "in any state or federal court," and thereby denying all but one forum the opportunity to weigh in on the matter—effectively ensure that questions regarding a state's compliance with Chapter 154 will be decided wrongly and, once decided, *never be revisited*. Indeed, absent this Court's intercession in this case, California's only available course will be to *change* its existing mechanism for review of capital cases in an effort to comport with the Ninth Circuit's multiple misapprehensions of law, and then seek a modification of the injunction. In effect, having decided the question of California's compliance "under the current state of California law" in a proceeding that should have been dismissed, the Ninth Circuit has sanctioned a "remedy" that insulates its decision from *ever* being proved wrong. No justification for this extraordinary display of judicial power has been demonstrated. The actions of the district court and Ninth Circuit constitute so grave a departure from the accepted and usual course of judicial process as to compel the exercise of this Court's supervisory power.

I. The Ninth Circuit's Decision Creates an Intercircuit Split on an Issue of National Importance

The Eleventh Amendment stands as "an essential component of our constitutional structure," *Dellmuth v. Muth*, 491 U.S. 223, 239 (1989), embodying the "integrity retained by each State in our federal system," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). Among other things, "[i]t . . . serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole*

Indian Tribe of Florida v. Florida, 116 S. Ct. 1114, 1124 (1996). Under the *Ex Parte Young* doctrine, however, the Eleventh Amendment does not bar suits against state officials when such suits are "*necessary* to permit federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986)(emphasis added); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (to "end a continuing violation of federal law"). The question here, as it was in *Booth*, is whether the Eleventh Amendment's bar should be lifted under *Ex Parte Young* to allow a suit against state officials who disagree with death row inmates over the applicability of Chapter 154, on the theory that the state officials' views are wrong—and thus their expression a "violation of federal law."

Shortly after the instant complaint was filed in the Northern District of California, a nearly identical suit was filed by a group of Maryland prisoners. *Booth v. Maryland*, 940 F. Supp. 849 (D. Md. 1996). The district court in Maryland entered an order extending relief similar to that conferred here. *Id.* at 851-855. The Fourth Circuit reversed, and ordered the proceedings dismissed. *Booth v. Maryland*, 112 F.3d at 141-142. Rejecting the inmates' reliance on *Ex Parte Young*, the Fourth Circuit observed that state officials do not "violate" federal law merely by invoking a federal statute in support of their legal position.[6] Moreover, the ultimate correctness of state officials' position, of course, can be resolved against

6. On this point, the Third Circuit would appear to agree. *Death Row Prisoners v. Ridge*, 948 F.Supp. 1258, 1274 (E.D. Pa. 1996), *terminated by "respective declarations of counsel,"* 106 F.3d 35, 36 (CA3 1997)(construing similar lawsuit "not as importing or implying misconduct or violation of civil rights by any named defendant or official of Pennsylvania").

any competing contentions in the ordinary course of litigating the particular lawsuit in which the disagreement arises, an approach the Fourth Circuit thought "less damaging to state sovereignty" than a separate action pursued under *Ex Parte Young*. *Id.* at 143-144.

In this case, the Ninth Circuit disagreed with *Booth*, and found that a "continuing or impending violation of federal law" inheres in advocacy that is ultimately adjudged to be erroneous.[7] The Ninth Circuit endorsed the decision of the district court in *Booth*, a decision that did not, by that court's own description, "delv[e] into the intricacies of the law concerning Eleventh Amendment immunity." 940 F. Supp. at 851. Although the Ninth

7. Central to the Ninth Circuit's thinking on this point is its apparent belief that the State of California is responsible for appointing counsel to represent death row inmates in their *federal* habeas proceedings, such that the state's delay in making those appointments will somehow cause inmates to be "without counsel" during all or some significant portion of the 180-day filing period prescribed in 28 U.S.C. § 2263, forcing them to file "bare bones" petitions on their own behalf that offer "little hope of identifying violations of . . . federal constitutional rights which may have occurred in state court," "thereby depriving them of their right to the assistance of counsel at this critical stage of the habeas process, in violation of 21 U.S.C. § 848(q)." App. 10a-12a.

Federal appointments, however, are made by the *federal* courts. *E.g.*, No. Dist. Cal. Local R. 296-4. And however great the delay in appointing state counsel might be, the 180-day federal filing period *does not even start to run* until state direct review is completed, 28 U.S.C. § 2263(a), and it remains *tolled* for the entire period during which state collateral proceedings are pending, *id.*-§ 2263(b)(2). Thus if any inmate facing the 180-day deadline is ever "without counsel," or finds it necessary to file a "bare bones" federal petition in order to avoid missing that deadline, or otherwise experiences any deprivation under section 848(q), it will be for some reason *other than* the length of time it took to appoint counsel for *state* unitary proceedings. And, of course, if Chapter 154 is ever actually applied at all, it will be because a federal court so *rules*, not because a state official so urges.

Circuit certainly made no finding that the inmates' suit was "*necessary*" to resolve Chapter 154's applicability, in analyzing the extent to which an *Ex Parte Young* action against state officials would affect California's sovereign interests, the court saw "little, if any" difference between resolving the issue by suit against state officials for allegedly violating federal law and resolving it in the context of those particular habeas cases in which the statute's application had been questioned. Indeed, the Ninth Circuit thought the *Ex Parte Young* action to be preferable for reasons of "efficiency and fairness," App. 13a (citing 940 F. Supp. at 852 n. 3), but apparently did not consider the impact on California's sovereignty that results from having its "official[s] . . . expose[d] . . . to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Seminole Tribe*, 116 S. Ct. at 1133.

Questions concerning the scope and effect of the AEDPA are important, *see, e.g., Felker v. Turpin*, 116 S. Ct. 2333 (1996); *Lindh v. Murphy*, 117 S. Ct. 2059, but no less important now is the issue at the heart of the *Booth-Ashmus* split: What is the proper procedure for resolving those questions? If the Ninth Circuit's reading of *Ex Parte Young* is correct, then both *Felker* and *Lindh* could have been—and perhaps for reasons of "fairness and efficiency" should have been—brought as class action declaratory judgment suits against state officials of Georgia and Wisconsin to challenge the "lawfulness" (i.e., the correctness) of their understanding of the AEDPA. Indeed, if the Ninth Circuit is correct, then literally any disputed issue of federal law that arises in the course of litigation between the state and any private party is subject to resolution, at the private party's option, either (a) by motion in the proceeding to which the dispute relates, or (b) by separate action for a declaratory judgment to establish the "right" of the private party to

prevail on the point, which judgment is then enforceable by ancillary injunctive relief preventing the state from ever asserting its opposing view.

Leaving the *Booth-Ashmus* split unresolved will have profound ramifications not only for states' sovereign interests, but for the quality of the federal judiciary's decisionmaking process. Under the Ninth Circuit's view of *Ex Parte Young*, difficult issues of first impression will be resolved by one (and only one) decisionmaker, whose determination will be reviewed once (and only once) by an appellate court that necessarily will be denied the benefit ordinarily obtained "through development of legal doctrine by allowing litigation in multiple forums." *United States v. Mendoza*, 464 U.S. 154, 163 (1984). The risk of error under these circumstances will be great, as the Ninth Circuit's decision in this case abundantly illustrates. (*See* section II.) But even worse, by enjoining *all* other advocacy on the point from the outset and *in futuro*, courts adhering to the Ninth Circuit's adjudicative model will make their inevitable errors wholly uncorrectable by ordinary legal process. (*See* section III.)

II. The Ninth Circuit's Decision is Based on Numerous Misapprehensions of State and Federal Law

In deciding that California's unitary review procedure does not qualify under Chapter 154, the Ninth Circuit misconstrued state law and ignored the language of Chapter 154 itself.

For example, the Court concluded that California has no qualifying standards for appointment of counsel because its standards are contained in section 20 of the Standards of Judicial Administration, which is not, as defined in the Introductory Statement of the California Rules of Court, a "rule of court" adopted by the state Judicial Council. App. 18a. But "Rules" adopted by the

Judicial Council are not the only "rules of court" under California law; rather, "[e]very court may make rules for its own government and the government of its officers not inconsistent with the rules adopted and prescribed by the Judicial Council." Cal. Gov't Code § 68070; App. 87a.

Moreover, it is plain from the legislative history of the AEDPA that Congress did not use the term "rule of court" in any narrow or technical sense, but understood it to include such provisions as the California Supreme Court's "Death Penalty Policies," *see* 137 Cong. Rec. at S3221 (Mar. 13, 1991)(noting that "California . . . has adopted a unitary review for capital cases *by rule of its supreme court*" (emphasis added)). Under these circumstances (ignored by the Ninth Circuit), there is simply no reason to suppose that Congress thought California's "Standards of Judicial Administration" would not suffice to establish "standards" of attorney competence within the meaning of Chapter 154. After all, California's "Standards" appear in the "Appendix" to the California Rules of Court, and like the state supreme court's Death Penalty Policies (of which Congress was obviously aware), they are published and bound in volumes that have the words "Court Rules" emblazoned on their spines and covers. At any rate, although the actual specification of California's standards appears in section 20, their *existence* is most certainly "provided" by California Rule of Court 76.5, wherein they are cross-referenced; indeed, "establishing and maintaining lists of qualified counsel" is something that section 20 itself declares is "*required by* rule 76.5." As one often sees with legal "mechanisms," what is "provided" by one device is actually "implemented" by some other: The Northern District of California's own "Assignment Plan," for example, "implement[s] the *provisions*" of both statutes and "Local Rules" by use of a "system," the description of which appears in West Publishing Company's "California Rules of Court—Federal (1997)," in the section

containing, interestingly enough, its "Local Rules." *Id.* at 317, 420.

There is also no requirement in Chapter 154 that the state's standards be "binding or mandatory," as the Ninth Circuit appears to hold. App. 18a-19a. Notably, the *federal* standards for appointing capital counsel are subject to discretionary departure, *see* 21 U.S.C. § 848(q)(7), and there is no basis for assuming that Congress would have wanted state courts to forfeit the comparable measure of latitude and flexibility afforded by Rule 76.5 and section 20, as a condition to qualifying under Chapter 154. Nor, of course, is there any basis for the Ninth Circuit's insinuation that the state supreme court could, or would, "completely disregard" the standards specified in section 20. App. 18a. Indeed, the Ninth Circuit almost certainly knows that insinuation to be unfounded, as Mr. Ashmus's own counsel surely do. *See Bonin v. Vasquez*, 999 F.3d 425, 430 (CA9 1993)(noting well before the AEDPA that California had "extended a right to competent counsel to state habeas petitioners"); Sowards, *And Now for Something Completely Different: Handling a Death Penalty Appeal*, California Litigation (Spring 1989)("Since the restoration of capital punishment in 1977, the California Supreme Court has committed itself to appointing high-caliber attorneys to handle automatic appeals").

The Ninth Circuit also concluded that California "fails to comply with Chapter 154 because . . . [t]the California Supreme Court limits compensation to collateral claims that are discoverable by reference to the four corners of the appellate record." App. 19a (citing *Clark*, 5 Cal.4th at 783-784 & n.19, 21 Cal.Rptr. at 531-532 & n.19, 855 P.2d at 751-752 & n.19). What *Clark* actually says is that counsel in capital cases have

> an express obligation . . . to investigate possible bases for habeas corpus.

. . . .

To facilitate the investigation and preparation of a habeas corpus petition, when appellate counsel is aware of facts which may constitute a basis for habeas relief, he is authorized by the Policies to expend up to $3,000 for investigation of that potential claim without prior approval of the court. . . . Additional sums for investigation may be authorized by the court on an application which identifies the specific issues to be explored and the specific facts which suggest that a basis for a potentially meritorious habeas corpus claim exists. . . . In either case the expenditure will be considered reasonable only to investigate facts which have come to counsel's attention suggesting that a basis for habeas corpus relief may exist. It is not the intent of the court to authorize or fund 'fishing expeditions' whose purpose is solely to discover if any basis for a collateral attack on a presumptively valid judgment can be found.

. . . .

[Counsel's] obligation . . . is limited . . . to an investigation of potentially meritorious grounds for habeas corpus which have come to counsel's attention in the course of preparing the appeal. The appointment does not impose on counsel an obligation to conduct an unfocused investigation having as its object uncovering any possible factual basis for a collateral attack on the judgment. Only an investigation into specific facts known to counsel which could reasonably lead to a potentially meritorious habeas corpus claim is anticipated and required. When the factual basis for a claim is already known, the

claim must be presented promptly unless facts known to counsel suggest the existence of other potentially meritorious claims which cannot be stated without additional investigation.

Id. Thus, the California Supreme Court will not fund an investigation if no reasonable basis is shown for believing it will lead to a potentially meritorious claim. That is the *only* limitation, and it is most certainly a *reasonable* one.[8] The state court's reference to the "course of preparing the appeal" simply defines a *time frame*, the very *same* time frame to which Congress referred when defining the period during which a unitary review procedure authorizes the presentation of collateral claims. 28 U.S.C. § 2265; App. 84a (". . . to raise . . . in the course of direct review . . .").[9] The court's reference imposes no limitation on the permissible sources that might support the basis for a valid funding request. Thus, if counsel, *while* representing a death row inmate on appeal, learns—from *any* source—facts "which could reasonably lead to a potentially meritorious habeas corpus claim," investigation is "*required*," and funds will be authorized therefor. California has no "four corners" rule.

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8. "Reasonableness" is the touchstone standard for passing on funding requests in state and federal court alike, *compare* Cal. Pen. Code §1241 *with* 28 U.S.C. § 848(q)(4), and it is also the standard on which Chapter 154 compliance will depend. 28 U.S.C. §§ 2261, 2265; App. 82a-84a. Dispensing investigative funds *without* some basis for believing the expenditure might prove useful would surely be *un*reasonable.

9. The obligation to investigate arises from the court's appointment, the very purpose of which, of course, is to provide representation on appeal *and in any habeas proceeding*; the latter must be initiated "in a timely fashion," and will be presumed timely "if it is filed within 90 days after the due date for the filing of appellant's reply brief *on the direct appeal*." Policies; App. 93a-94a.

Finally, the Ninth Circuit found that "California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154." In support of this holding, the court cited "evidence that counsel often is not appointed until years after a prisoner accepts the offer of counsel," and added: "California may not take advantage of the six-month limitations when it takes years to appoint counsel." App. 20a.

The Ninth Circuit does not say how *soon* "after" acceptance of the state's offer of counsel it must be honored with an actual appointment. This silence is not surprising, since Chapter 154 imposes no time condition. Indeed, the inmate's "acceptance" is not even the event that triggers appointment: it is the *court's* "finding" of both acceptance and indigency that does that, and no time limit is established for the occurrence of those events either. The Ninth Circuit implies one, however, apparently from Congress's bare use of the word "upon."

Congress knows well how to specify deadlines when its purpose is to ensure that events occur within defined periods, and it did so throughout the AEDPA as it thought appropriate. *See, e.g.*, 8 U.S.C. § 504(e)(3)(C)(not later than 15 days); *id* § 505(c)(3)(B)(not later than 60 days); *id*. § 1252(c)(2)(30 days).[10/] Congress's omission

10. It also knows that the preposition "upon" typically serves to introduce a condition precedent, but without any necessary implication of "immediacy." *See, e.g.*, 21 U.S.C. § 848(q)(9)("*Upon* a finding that . . ."); 18 U.S.C. § 3664(d)(1)("*Upon* the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing . . ."); *id*. § 3664(f)(2)("*Upon* determination of the amount of restitution owed to each victim, the court shall . . ."); *id.* § 3616A(a)(1)("*Upon* a finding that the defendant is in default . . ., the court may . . ."); 28 U.S.C. § 1605(g)(". . . the court, *upon* request of the Attorney General, shall stay . . ."); 18 U.S.C. § 2339B(f)(1)(A)("In any civil proceeding under this section, *upon* request made ex parte and in writing by the United States, a court, *upon* a sufficient showing, may authorize . . .").

of any deadline for a state court's appointment of counsel after making a finding of acceptance and indigency belies the Ninth Circuit's assumption that Congress intended to impose one. And why would Congress have felt any need to impose such a deadline anyway? Delay prejudices the states' interests *wherever* it occurs, and thus the states have ample incentive to reduce their own delay without congressional encouragement.

The Ninth Circuit's insistence that "California may not take advantage of the six-month limitations period when it takes years to appoint counsel" apparently stems from its assumption that delays in *state* appointments somehow leave inmates "without counsel" during the 180-day limitations period. As noted, that assumption is woefully mistaken. *See supra* note 7.

III. The Ninth Circuit's Decision Unconstitutionally Restrains State Officials From Engaging in Lawful Advocacy

It is one thing for a state to suffer an adverse legal ruling; it is quite another to have its officials "expose[d] . . . to the full remedial powers of a federal court, including, presumably, contempt sanctions," for continuing to present the state's position in pending litigation. The difference is not, as the Ninth Circuit thinks, "a matter of timing, not of substance." App. 12a.

Since May 20, 1996, California officials have been continuously enjoined from arguing that its review procedures comport with the prescriptions of Chapter 154. CR 20. If the district court had simply issued a ruling in a pending habeas proceeding rejecting that position, and the Ninth Circuit had simply affirmed that ruling on

appeal, California's inmates would have obtained as much "certainty" on the point as they are conceivably entitled to get. And whatever justification might have once been conjured for muzzling state officials' advocacy in the district courts during the pendency of the state's appeal to the circuit,[11] that justification surely exists no longer.

Had the Ninth Circuit not been spared the distracting effects of "divergent district court opinions," it might have reached the correct result on the important question before it. The error is now law of the circuit. But it is more than that: By continuing the injunction against state officials' advocacy on the point, the court has made its error wholly uncorrectable by regular legal process.

As we have explained, the Ninth Circuit's conclusion that California does not currently qualify under Chapter 154 rests on numerous misapprehensions of state and federal law. The full extent of those errors, one can confidently predict, will gradually appear as other federal courts begin to produce a body of decisions interpreting Chapter 154 and the California Supreme Court reiterates state law in a way that makes it even clearer that the Ninth Circuit does not understand it. Ordinarily under those circumstances—and *but for* the injunction prohibiting state officials from contending that Chapter 154 should properly be applied "*under the current state of California law*"—we would call those authorities to the attention of the district courts (if only to preserve the issue) and the Ninth Circuit, and urge that the holding of

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11. That there was a risk of "divergent district court opinions," App. 13a, like Ashmus's own confessions of "uncertainty" over the correctness of his position, CR 1 at 3, simply shows that the application of Chapter 154 to California death judgments presents at least an arguable issue over which reasonable minds might differ. To rational decisionmakers, this might seem a reason to foster debate, rather than *enjoin* it.

this case be repudiated. *See Distribuidora Dimsa v. Linea Aerea Del Cobre*, 768 F. Supp. 74 (S.D.N.Y. 1991)("A district court has no authority to reject a doctrine developed by a higher court unless subsequent events make it 'almost certain that the higher court would repudiate the doctrine if given a chance to do so'"); *Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237, 242 (CA3 1993)(earlier understanding of state law shown to be incorrect); *Aguirre v. I.N.S.*, 79 F.3d 315, 317 (CA2 1996)("[T]he interests of nationwide uniformity outweigh our adherence to Circuit precedence in this instance"); *Critical Mass Energy Project v. N.R.C.*, 975 F.2d 871, 877 (CCA 1992)("[A] circuit court may reexamine its own established interpretation of a statute if it finds that other circuits have persuasively argued a contrary construction [and] [a]n *en banc* court may also set aside its own precedent if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed")(en banc); *United States v. Hill*, 48 F.3d 228, 232 (CA7 1995)("When a number of circuits reject a position we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse"); *United States v. Gay*, 967 F.2d 322, 327 (CA9 1992)("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel [unless] 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point'"); *United States v. Aguon*, 851 F.2d 1158, 1167 n.5 (CA9 1988)("The province and obligation of the *en banc* court is to review the current validity of challenged prior decisions")(en banc).

But in this case, the unprecedented terms of the injunction imposed by the district court, and now sanctioned by the Ninth Circuit, will make such an appeal

to law and reason altogether impossible. "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.'" *In re Primus*, 436 U.S. 412, 432 (1978). The judgment of the Ninth Circuit denies state officials "the use of established adjudicatory procedures" to which they are entitled. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1981). This extraordinary deprivation cannot be justified by observing that state officials remain "free to voice their opinion" *outside* the context of litigation, for *access to the courts* is essential to the purpose of such expression. ""Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.'" *Primus*, 436 U.S. at 432.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 3, 1997.

Respectfully submitted,

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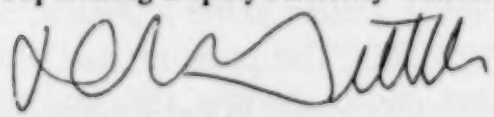

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioner*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General,
Defendants-Appellants.

No. 96-16141
D.C. No.
CV-96-10533-TEH
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding
Argued and Submitted
September 18, 1996—San Francisco, California
Submission Vacated June 11, 1997
Resubmitted August 11, 1997

Filed August 18, 1997

Before: Robert R. Beezer and David R. Thompson, Circuit Judges, and Helen Gillmor,* District Judge.

* Honorable Helen Gillmor, District Judge for the District of Hawaii, sitting by designation.

Opinion by Judge Thompson; Dissent by Judge Beezer

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OPINION

THOMPSON, Circuit Judge:

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (Act). Troy A. Ashmus, a state prisoner who has been sentenced to death, brought this action on behalf of himself and others who have been sentenced to death in California. Ashmus contends California may not take advantage of certain benefits provided by Chapter 154 of the Act because California has not yet qualified under the provisions of that Chapter. Chapter 154 of the Act applies to federal habeas corpus proceedings filed by state prisoners under sentence of death. The district court held that California does not qualify under Chapter 154, issued a declaratory judgment to that effect, and preliminarily enjoined California from attempting to invoke any of Chapter 154's benefits. *Ashmus v. Calderon*, 935 F.Supp. 1048 (N.D.Cal. 1996).

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's preliminary injunction. In conducting this review, we first consider whether the

Eleventh Amendment bars this suit. We conclude it does not. We also conclude the district court did not err by issuing its preliminary injunction. We clarify the terms of that injunction, however, to provide that California is enjoined from seeking the benefits provided by Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death.

FACTS

On the day the President signed the Act, Ashmus filed this action in the district court. In his complaint he sought a declaration that California does not qualify under Chapter 154 and that the provisions of Chapter 154 do not apply to the plaintiff class members' habeas corpus proceedings. He also sought injunctive relief prohibiting the State from asserting in any state or federal proceeding that it has qualified under Chapter 154, until the State convinces the district court that it has qualified.

In a thorough opinion, the district court granted Ashmus's request for declaratory relief, entered its declaratory judgment, and issue 1 a preliminary injunction. *Ashmus*, 935 F.Supp. 1048. The district court determined that California, at the present time, does not qualify for Chapter 154's benefits and, as a result, the provisions of Chapter 154 do not apply to the class members' habeas corpus proceedings. The district court enjoined the defendants and their agents "from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 . . . in any state or federal proceeding involving any class member." The district court also certified the class as:

> All prisoners who have been sentenced to death by the State of California and are currently

> awaiting execution pending resolution of their state and federal challenges to their state convictions and sentences, except those such persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989.[1]

This appeal followed.

DISCUSSION

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Act amended Chapter 153 of Title 28, which governs federal habeas corpus petitions filed by state prisoners. The Act also added a new Chapter 154, which deals exclusively with habeas corpus petitions filed by state prisoners who have been sentenced to death. Chapter 154 applies only if a state "opts in" and qualifies under either the "post-conviction" or "unitary review" procedures set forth respectively in sections 2261 and 2265 of Chapter 154.

California contends it has qualified under the unitary review procedure. Consistent with this position, the state defendants and their agents have threatened to invoke Chapter 154 in all proceedings involving the plaintiff class members.

Chapter 154 defines a "unitary review" procedure as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on

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1. The State conceded that prior to June 1989 it did not provide counsel in a manner which complies with Chapter 154.

collateral attack." 28 U.S.C. § 2265(a). Thus, instead of pursuing a direct appeal of a conviction and a sentence of death and separately pursuing a collateral state habeas corpus proceeding, an appellant/petitioner in California may raise all claims in a single state appeal.

To qualify under the unitary review procedure, a state must appoint counsel to litigate collateral claims, establish standards of competency for the appointment of counsel, and provide reasonable compensation for counsel to investigate and present the collateral claims. 28 U.S.C. § 2265(a), (b). If a state satisfies these requirements and opts into the unitary review procedure, the state is entitled to the benefits of Chapter 154.

As stated by the district court, the Act provides a *quid pro quo* arrangement. In exchange for providing competent counsel and paying reasonable compensation for the investigation and presentation of a condemned prisoner's collateral claims before a state court, Chapter 154 offers expedited review of the federal petition, limitations on a petitioner's ability to amend a federal petition, and restrictions on a federal court's review of the merits of a federal habeas petition.

The expedited review provisions impose limitation periods for the filing and resolution of a federal habeas corpus petition. A petitioner must file a federal habeas corpus petition, subject to limited tolling provisions, "not later than 180 days after final State court affirmance of the conviction and sentence on [unitary review] or the expiration of the time for seeking such review." 28 U.S.C. §§ 2265(c), 2263(a), (b). If the petitioner fails to file a federal petition within this time period, "no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves

the filing of a second or successive application under section 2244(b)." 28 U.S.C. § 2262(c).

Thus, if a petitioner does not file a federal petition within the limitations period, any petition which is filed later is treated as if it were a second or successive petition rather than an initial petition. In the past, we have not addressed the merits of claims in a second or successive petition unless the petitioner demonstrated "cause and prejudice" or "a fundamental miscarriage of justice." *See McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Although we do not decide the question, the Act appears to apply a more stringent standard than the standard adopted by McCleskey. *See* 28 U.S.C. § 2244(b)(1), (b)(2), (b)(3)(C).[2]

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2. Under the Act, the district court is directed to dismiss a claim presented in a second or successive petition if that claim "was presented in a prior application." 28 U.S.C. § 2244(b)(1). As a court of appeals, we may issue an order authorizing the filing of a second or successive petition only if the petitioner makes a prima facie showing that the claim was not presented in a prior petition and that the new claim:

> (A) ... relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
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> or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
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> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(1), (b)(2), (b)(3)(C).

Chapter 154 also attempts to expedite federal habeas review by requiring courts to dispose of habeas petitions within certain time limits. A district court is directed to "render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed." 28 U.S.C. § 2266(b)(1)(A). A district court may extend this time period, one time, for thirty days, for limited and specified causes, not including a court's congested calendar. 28 U.S.C. § 2266(c)(i), (ii), (iii). Further, the district court is required to give priority to capital habeas petitions "over all noncapital matters." U.S.C. § 2266(a). If the district court does not comply with this time limitation, the state may petition the appellate court for a writ of mandamus and the appellate court must "act on the petition . . . not later than 30 days after the filing of the petition." 28 U.S.C. § 2266(b)(4)(B).

If appealed, the court of appeals must issue a final decision "not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed." 28 U.S.C. § 2266(c)(1)(A). Further, the court of appeals has only thirty days to decide whether to grant a petition for rehearing or request for rehearing en banc and, if rehearing is granted, must render a final decision "not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered." 28 U.S.C. § 2266(c)(1)(B)(i), (ii). The state may enforce the time limitations governing the appellate courts by applying for a writ of mandamus to the United States Supreme Court. 28 U.S.C. § 2266(c)(4)(B).

We emphasize that in this appeal we express no opinion on the construction or the constitutionality of the Act. Those questions are not before us. The issue we

consider is whether California has qualified under the Act's unitary review procedure so that California may invoke the benefits of Chapter 154. We have highlighted the provisions of Chapter 154 above simply to illustrate the burdens the Act seems to impose on death penalty prisoners and the "benefits" it seems to confer on states who qualify under Chapter 154. Understanding these apparent burdens and benefits is fundamental to the analysis of whether California qualifies under Chapter 154. Before discussing the merits of that question, however, we first examine our jurisdiction.

B. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's preliminary injunction. *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 215 (9th Cir.1989).

We do not have jurisdiction under 28 U.S.C. § 1291 to review the district court's declaratory judgment that California does not qualify under Chapter 154 because other claims are still pending before the district court. *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). A decision is final under Section 1291 only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

In reviewing the injunction pursuant to section 1292(a)(1), however, we may examine matters which are "inextricably bound up" with it. *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir.1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). In this appeal, whether California complies with Chapter 154 is "inextricably bound up" with the district court's preliminary injunction because the district court's

determination that California does not comply with Chapter 154 is the basis for the injunction. *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir.1993), cert. dismissed, 510 U.S. 1033, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994); *Bernard*, 873 F.2d at 215-16.

C. Eleventh Amendment

We next consider California's argument that the district court's declaratory judgment and preliminary injunction violate the State's right to immunity under the Eleventh Amendment. We conclude the present action falls within the Ex Parte Young exception, and the Eleventh Amendment does not bar this suit.

[1] The *Ex Parte Young* exception provides that the Eleventh Amendment generally is not a bar to an action seeking only prospective relief. *See, e.g., Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992). California, however, calls our attention to the Fourth Circuit's recent decision in *Booth v. State*, 112 F.3d 139 (4th Cir.1997). In *Booth*, the Fourth Circuit concluded the Eleventh Amendment barred a similar action which challenged whether Maryland had opted in to Chapter 154. *Id.* at 143-44. The Fourth Circuit concluded Maryland's announced intention to invoke Chapter 154 in future habeas corpus proceedings did not threaten to violate and did not violate any federal law. *Id.* at 143. The Fourth Circuit reasoned, "A party bringing suit must always take the possibility of a successful affirmative defense into account in its litigation strategy." *Id.*

[2] We agree that, to fall within the *Ex Parte Young* exception, the plaintiffs in this action must identify a continuing or impending violation of federal law. *See Green v. Mansour*, 474 U.S. 64, 73, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *see also Watkins v. Blinzinger*, 789

F.2d 474, 483-84 (7th Cir.1986). The plaintiffs satisfy this requirement. They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) "grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any federal post conviction proceeding." *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 2571, 129 L.Ed.2d 666 (1994) (internal quotations and footnote omitted).

[3] Counsel has not yet been appointed to represent over 130 of the condemned California inmates who make up the plaintiff class. This number no doubt will increase because, according to the district court's estimate, the class will increase by two or three members each month, and it may take years from the date a condemned inmate requests the assistance of counsel until counsel who will take the case is found and appointed. By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.

[4] Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to restrictive federal review. The downside of choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great.

If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel.[3] In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court.

It is no answer to say that a district court might allow the condemned prisoner to amend his bare bones petition. A district court might not allow the amendment. *See* 28 U.S.C. § 2266(b)(3)(B) (prohibiting amendment after answer is filed unless petitioner demonstrates amendment is not an abuse of the writ). Should this happen, the prisoner will be stuck with what most likely will be a losing first petition; and when that petition gets denied any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive

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3. We recognize that the class includes some condemned inmates who have actually been appointed counsel. As discussed, however, years elapse before counsel is actually appointed. Further, even inmates with counsel may be forced to file a bare bones petition due to the uncertainty as to whether California qualifies under Chapter 154, when California qualified, and when the 180-day period began to run and when the period has or will expire.

petitions. If he loses on his successive petition, he will die.

[5] The State is not entitled to these "benefits" of Chapter 154 unless it complies with the opt-in requirements of that Chapter. Until it does, it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28. The State's threat to use Chapter 154 in this way also forces the prisoners to file bare bones petitions within the 180-day time limit, before counsel will have been appointed to assist them, thereby depriving them of their right to the assistance of counsel at this critical stage of the habeas process, in violation of 21 U.S.C. § 848(q).

[6] Permitting this action to proceed despite California's Eleventh Amendment immunity defense, as California presents that defense, will have little, if any, impact on the State's sovereign interests. *See Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540 (June 23, 1997) (stating court should analyze extent to which an action will affect a State's sovereignty). California is not complaining about being haled into federal court to determine whether it qualifies under Chapter 154. Instead, California argues the appropriate procedure for resolving this dispute is to litigate the issue in each individual federal habeas proceeding, rather than in this single universal action. Whether the issue is resolved in this action or in separate individual habeas proceedings, California acknowledges the issue will be resolved by a federal court into which it will be haled, if not willingly at least resignedly. If there is any impact on California's sovereignty beyond what there would be as a result of separate federal habeas proceedings, the impact is slight. If anything, it is a matter of timing, not of substance.

[7] Finally, efficiency and fairness concerns dictate that this single action is the appropriate method to resolve whether California qualifies under Chapter 154. These concerns affect the determination of whether the *Ex Parte Young* exception applies. *See Coeur d'Alene*, 65 U.S.L.W. at 4543. If the condemned inmates were forced to litigate the opt-in issue in each individual federal habeas proceeding, divergent district court opinions could occur. Resolving the issue in this single universal action will avoid such a consequence.

[8] Deciding the issue here and now also avoids a multiplicity of suits addressing the same issue. As District Judge Motz observed in his opinion when Booth was before the district court, "[r]equiring relitigation of those questions in each habeas case is also inconsistent with the purpose of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 et seq., to reduce the cost and delay of civil litigation in the federal courts." *Booth v. State*, 940 F.Supp. 849, 852 n. 3 (D.Md.1996). We also embrace Judge Motz's view that "it is clearly not in the interest of any citizen of the State of [California] to have her state and federal tax dollars wasted by having assistant attorneys general and counsel for capital defendants appointed and compensated under the Criminal Justice Act litigate before multiple judges in successive pieces of litigation issues that can easily be resolved in a consolidated proceeding." *Id.*

[9] We conclude that the Eleventh Amendment does not bar this action.

D. Merits

We will uphold a district court's grant of a preliminary injunction unless the district court "incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). "Although district courts have wide discretion in issuing preliminary injunctions, 'where the district court is alleged to have relied on erroneous legal premises, review is plenary.'" *Id.* (quoting *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 455 (9th Cir.1994)).

1. Declaratory Judgment

In his complaint, Ashmus asserted a "claim" or "cause of action" under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and under 42 U.S.C. § 1983. The district court issued its preliminary injunction as "necessary and proper to effectuate the terms of its declaratory judgment." The State argues that the injunction is ancillary to the declaratory judgment, and is improper because Ashmus's request for declaratory relief is not a separate claim but is merely a remedy for his section 1983 claim. Thus, according to the State, the district court could issue the injunction only if Ashmus made a sufficient showing on the merits of his section 1983 claim. We reject this argument and conclude we need not address California's arguments relating to the merits of Ashmus's section 1983 claim.

First, a district court may issue an injunction as ancillary to a declaratory judgment. *See* 28 U.S.C. § 2202 (permitting court to issue "[f]urther necessary or proper relief based on a declaratory judgment"); *Doe v. Gallinot*, 657 F.2d 1017, 1024-25 (9th Cir. 1981) (concluding district court did not err in issuing injunction under section 2202).

Further, a request for a declaratory judgment does not require an independent underlying claim. The Declaratory Judgment Act permits the adjudication of rights before a claim for damages or injunctive relief arises. *Societe de Conditionnement v. Hunter Eng'g Co.*, 655 F.2d 938, 942-43 (9th Cir. 1981). "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Id.* at 943.

[10] The key inquiry is whether the invocation of judicial authority to render a declaratory judgment is justified. *Cf.* Edward Borchard, Declaratory Judgments 18, 26 (2d ed.1941). To assert a claim for declaratory relief, a plaintiff need only demonstrate an independent basis of federal jurisdiction and an actual case or controversy. *Cf.* Schwarzer, Tashima, & Wagstaffe, Federal Civil Procedure P 10.6 (1996); *see also Eureka Fed. Sav. & Loan v. American Casualty Co.*, 873 F.2d 229, 231 (9th Cir.1989) (defining actual case or controversy and setting forth guiding principles to determine if declaration appropriate). If the court has subject matter jurisdiction of an actual case or controversy, a party who satisfies the requirements for a declaratory judgment action need not wait until a separate underlying claim arises.

[11] The district court had federal question jurisdiction under 28 U.S.C. § 1331: the interpretation and application of a federal statute, the Act. *See Guinasso v. Pacific First Fed. Sav. & Loan*, 656 F.2d 1364, 1365-66 (9th Cir.1981), cert. denied, 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982).

[12] Ashmus also sufficiently demonstrated that his action involves an actual case or controversy. He established that the State's threats to invoke Chapter 154 will significantly affect the plaintiff-class's ability to obtain habeas corpus review by a federal court. He

demonstrated that the class members may be forced to immediately file bare-bones petitions to comply with the six-month filing deadline under Chapter 154. There is no guarantee that, after filing such a bare bones petition, a district court will allow its amendment. *See* 28 U.S.C. § 2266(b)(3)(B). By having to file an immediate federal habeas petition, class members may waive or fail to sufficiently develop meritorious claims.

[13] Because the plaintiff-class demonstrated that federal jurisdiction and an actual controversy exist and no prudential concerns warrant declining relief, *see McNabb v. Bowen*, 829 F.2d 787, 794 (9th Cir. 1987), the district court had the authority to issue a declaratory judgment.

2. Does California Qualify Under Chapter 154

As noted above, under the unitary review procedure, to qualify for the benefits provided by Chapter 154, California must:

> establish[ ] *by rule of its court of last resort* or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.
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> . . .
>
> [and] must include an offer of counsel following trial for the purpose of representation on unitary review

> . . . .

28 U.S.C. § 2265(a),(b) (emphasis added).

California argues that the following, in combination, constitute a "rule of its court of last resort" which set forth standards of competency and compensation: (1) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" (Rules of Court); (2) Rules of Court 76.5; (3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council; (4) the California Supreme Court's Statement of Internal Operating Practices and Procedures; (5) the California Supreme Court's Statement of Policies Regarding Cases Arising from Judgments of Death; (6) *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (Cal.1993); and (7) California Government Code Section 68511.5.

[14] Of these sources, the only competency standards are set forth in section 20 of the Standards recommended by California's Judicial Council. Section 20 provides:

> The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

[15] The district court determined that California does not qualify under Chapter 154 because (1) the competency standards are not set forth in a "rule of court of last resort;" (2) even if section 20 constituted a "rule of court of last resort," section 20 does not impose binding or mandatory competency standards and does not set forth any requirement that counsel have any expertise in investigating and presenting collateral habeas claims; (3) California does not provide an adequate mechanism for compensating counsel for the investigation and presentation of collateral habeas claims; and (4) California has not made a bona fide offer of counsel because, although counsel has been offered to members of the plaintiff class, counsel has not been timely appointed or actually appointed for approximately a quarter of the class members. We agree with these determinations.

The district court correctly determined that section 20 is a recommendation but is not a "rule of court." California's Judicial Council has the power to "make recommendations to the courts" and to "adopt rules for court administration." Cal. Const. Art. VI, § 6. The Introductory Statement to the California Rules of Court states that the use of the term "should" indicates a particular section is a nonbinding recommendation. Cal. Rules of Court-State at 1 (1996). Section 20 consistently uses the term "should" rather than "shall." Clearly, therefore, section 20 is a recommendation, not a rule.

But, even if section 20 were a "rule of court," the nonbinding nature of the competency standards does not satisfy Chapter 154. It is clear that, in exchange for restrictions imposed on federal habeas review, Congress intended states to provide competent counsel. A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely

disregard when appointing counsel. Further, California has presented no evidence indicating that the State actually follows the relied-upon standards when appointing counsel for condemned prisoners.[4]

The district court also determined that section 20 is inadequate under Chapter 154 because the section does not require appointed counsel to have any familiarity with habeas corpus litigation. We recognize that habeas corpus law is complex and has many procedural pitfalls. We, however, are reluctant to require appointed counsel to have familiarity with or experience in habeas corpus law. Many lawyers who could competently represent a condemned prisoner would not qualify under such a standard. We conclude a state's competency standards need not require previous experience in habeas corpus litigation.

California also fails to comply with Chapter 154 because it does not provide compensation for counsel to adequately investigate and present collateral claims. The California Supreme Court limits compensation to collateral claims that are discoverable by reference to the four corners of the appellate record. *Clark*, 21 Cal.Rptr.2d 509, 855 P.2d at 751-52, 751 n. 19. This is not sufficient to comply with Chapter 154. Although states need not compensate counsel for a fishing expedition, competent counsel must be permitted some latitude in investigating claims that are not revealed by the record. It must be kept in mind that if a claim is not presented in an initial federal habeas petition, the petitioner runs the risk of waiving the claim even if it is meritorious. *See*

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4. We do not mean to imply that California actually must adopt the standards set forth in section 20. California simply must set forth adequate, mandatory standards in a rule of its court of last resort or by statute. 28 U.S.C. § 2265(a).

Brown v. Vasquez, 952 F.2d 1164, 1166-67 (9th Cir.), cert. denied, 503 U.S. 1011, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). Meritorious habeas claims may exist outside of the record. Indeed, ineffective assistance of counsel claims typically fall within this category.

Finally, the district court correctly determined that California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154. Chapter 154 requires a state to enter an order appointing counsel "upon a finding that the prisoner is indigent and accepted the offer [of counsel] or is unable competently to decide whether to accept or reject the offer . . . ." 28 U.S.C. § 2261(c)(1), 2265(b). The plaintiff class presented evidence that counsel often is not appointed until years after a prisoner accepts the offer of counsel. California may not take advantage of the six-month limitations period when it takes years to appoint counsel.

[16] In sum, we hold that California does not qualify at this time for the benefits of Chapter 154. This holding does not preclude California from adopting policies to qualify under Chapter 154. We conclude only that, to take advantage of the benefits under Chapter 154, California must fulfill its part of the bargain by timely appointing and compensating competent counsel to assist a condemned prisoner in his or her unitary review proceedings.

[17] Nor did the district court err in determining that an injunction was necessary to effectuate its declaratory judgment. Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case.

[18] We clarify the injunction, however, to provide that California is enjoined from asserting in any state or federal court that it qualifies for the benefits of Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death. Moreover, the district court may determine, depending upon future events, to modify its injunction as may be appropriate.

E. First Amendment

California also contends the injunction violates the First Amendment. We disagree. The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements.

F. Attorney Fees

The plaintiff class requests attorney fees on appeal, asserting they are "prevailing parties" under 42 U.S.C. § 1988. To be eligible for an award under section 1988, a party "must prevail on at least some aspect of the merits of his civil rights claim." *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir.1988); *see also Jensen v. City of San Jose*, 806 F.2d 899, 900-01 (9th Cir. 1986). In this appeal we do not address any aspect of the class's section 1983 civil rights claim. Accordingly, we decline to award any attorney fees.

CONCLUSION

The district court, in a thorough and well-reasoned opinion issued under severe time constraints, correctly determined that California does not presently qualify under Chapter 154, and properly issued its declaratory judgment. We affirm the district court's preliminary injunction, as clarified by this opinion. The district court retains the power to modify the injunction depending upon future events.

AFFIRMED.

BEEZER, *Circuit Judge*, dissenting:

Among the defenses pleaded in the district court by Calderon, as warden, and his co-defendants is the "seventh defense," which asserts: "Defendants allege that the relief sought in the complaint is barred by the Eleventh Amendment to the United States Constitution."

No court is free to address the merits of a cause until it is satisfied that it has jurisdiction over the subject matter of the case and the parties to the litigation. The district court here claimed jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the Constitution, laws or treaties of the United States) and under 28 U.S.C. § 1343(a)(3) (action under 42 U.S.C. § 1983). The district court did not claim to exercise habeas corpus jurisdiction under 28 U.S.C. § 2254.

In lengthy findings of fact, conclusions of law and order filed June 14, 1996, the district court does not address the defendants' seventh defense. I will.

The complaint alleges that this action is brought against defendants in their official capacity. Be the action

against a prison warden, the Director of the Department of Corrections or the Attorney General of California, these officers act in their official capacity and in furtherance of sovereign powers of the State of California. Each official claims Eleventh Amendment immunity.

The court's opinion filed today (Discussion, part C) tells us that the immunity defense will not lie because the prisoners' class action claims fall within the *Ex Parte Young* exception. The exception, we are told, arises from the fact that the prisoners have identified "a continuing or impending violation of federal law."

The Fourth Circuit in *Booth v. State of Maryland*, 112 F.3d 139 (4th Cir. 1997), considered a prisoner complaint which made claims that the prisoners mimic here. I am persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense. After engaging in an exacting analysis, the *Booth* court concluded:

> In sum, this action fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either. *Green*, 474 U.S. at 74. *Id.* at 144.

I would direct the district court to quash its preliminary injunction, vacate its order of June 14, 1996

and dismiss the plaintiffs' complaint. This would grant the state officials the Eleventh Amendment immunity to which they are entitled. I would avoid the inter-circuit conflict of decision in a matter of national concern that is created by the rejection of the *Booth* holding in our court's opinion filed today.

FILED
JUNE 14, 1996
RICHARD WEIKING
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. C 96-1533 TEH
v.	)	
	)	
ARTHUR CALDERON,	)	FINDINGS OF FACT,
et al.,	)	CONCLUSIONS OF
	)	LAW AND ORDER
Defendants.	)	
	)	

INTRODUCTION

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("Act"), Pub.L. 104-132, 110 Stat. 1214, to the State of California. Plaintiffs[1] contend that California has failed to comply with the Act's so-called "opt-in" provisions, as set forth in the newly created Chapter 154 of the Judicial Code. Accordingly, plaintiffs contend, the expedited review and other provisions of Chapter 154 do not, and

1. Troy A. Ashmus is the only named plaintiff in this action. Because the Court has already provisionally certified the class, however, and for convenience sake, the Court will use the plural form, plaintiffs, unless referring specifically to Mr. Ashmus.

cannot, apply to petitions brought under 28 U.S.C. § 2254 by prisoners challenging California judgments of death.

On May 24, 1996, the Court issued a short order granting plaintiffs' request for provisional class certification, declaratory relief, preliminary injunctive relief, and to proceed in forma pauperis. The Court also granted defendants' request for a temporary stay of the preliminary injunction and denied defendants' expedited motion to dismiss. In accordance with Fed.R.Civ.P. 65 and the dictates of Fed.R.Civ.P. 52(a), this memorandum opinion and order sets forth the findings of fact and conclusions of law that constitute the grounds for the Court's May 24 order.

Good cause appearing, and for the reasons discussed below, the Court also hereby GRANTS defendants' request for a partial five (5) day stay of this order, and MODIFIES its provisional certification of the class to exclude the approximately 50 death row inmates in California whose sentences were affirmed on direct appeal prior to June 6, 1989.

FINDINGS OF FACT

1. The Parties

Plaintiff Ashmus is a prisoner who has been sentenced to death by the State of California. The California Supreme Court affirmed his conviction and sentence on December 5, 1991. *People v. Ashmus*, 54 Cal.3d 932, 2 Cal.Rptr.2d 112, 820 P.2d 214 (1991), rehearing denied, Jan. 29, 1992, cert. denied, 506 U.S. 841, 113 S.Ct. 124, 121 L.Ed.2d 79 (1992). On February 17, 1993, plaintiff instituted federal habeas proceedings challenging his conviction and death sentence by filing an Application for Appointment of Counsel and a Request

for Stay of Execution in *Ashmus v. Calderon*, No. 93-0594-TEH (N.D.Cal.). *See* Special Requirements for Capital Habeas Corpus Petitions, Local Rule 296-8(b) (condemned prisoner's pro se application for appointment of counsel and for temporary stay of execution "shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel"); *see also McFarland v. Scott*, 512 U.S. 849, ___ U.S. ___, 114 S.Ct. 2568, 2572-73, 129 L.Ed.2d 666 (1994) (concluding that a "'post-conviction proceeding' within the meaning of [21 U.S.C.] § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting appointment of counsel for his federal habeas corpus proceeding").

Plaintiff, whose current counsel was appointed in August 1995, had anticipated filing his "finalized petition" for writ of habeas corpus by August 2, 1996.[2] Magistrate Judge Joan Brennan recently vacated this "presumptive" filing date, however, and no date is currently set for the filing of his petition. *Ashmus v. Calderon*, No. 93-0594-TEH (JB) (N.D.Cal. May 24, 1996).

As of April 1, 1996, each of the 438 other members of the proposed plaintiff class had also been convicted and sentenced to death by the State of California, and was awaiting execution. More than a quarter of the proposed class members are without counsel and likely to remain so for some time. By defendants' own admission, "Every inmate who is awaiting appointment of counsel has been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defs.' 1st Opp'n Mem. at 16 (emphasis in original); *see also* Pls.' Ex. 5 at

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2. "'Finalized petition' [] refer[s] to the petition filed by retained or appointed counsel." Local Rule 296-5.

A1, Mack Reed, *An Even Longer Wait on Death Row*, L.A. Times, April 3, 1996, at A1, A14 (noting that 128 men and six women on death row are waiting for counsel). Approximately 145 of the proposed class members currently have pending federal habeas proceedings. On average, two to three individuals are added to the proposed class each month.

The four defendants are Arthur Calderon, Warden of San Quentin Prison and the custodian of all male persons sentenced to death and housed at that facility; Teena Farmon, Warden of the Central California Women's Facility, and custodian of all female persons sentenced to death and housed at that facility; James Gomez, Director of the California Department of Corrections; and Daniel Lungren, California Attorney General. Plaintiffs have sued each defendant in his or her official capacity and have alleged that each defendant acts under color of law.

2. The Statute

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Title I of the Act, entitled "Habeas Corpus Reform," modifies existing habeas corpus procedures contained in Chapter 153 of the Judicial Code (Title 28), and enacts a new Chapter 154, adding §§ 2261-2266 to Title 28.[3] [FN3] Chapter 154 offers a system of expedited review and other "benefits"[4]

3. Unless otherwise indicated, all further statutory references are to Title 28.

4. The benefits to opt-in states include a six-month statute of limitations on the filing of federal habeas corpus petitions, limitations on amendments to petitions and their factual development, and limitations on federal courts' power to review the merits of constitutional claims and order appropriate relief. 28 U.S. §§ 2263-2264. Moreover, for qualifying states, capital habeas matters must be reviewed under strict, statutorily prescribed time limits, and must be "given priority by the district court and by the court of appeals over all noncapital matters." § 2266(a).

to states that qualify under either of two so-called "opt in" procedures: (1) the "post- conviction" procedure provided for in § 2261 or (2) the "unitary review" procedure provided for in § 2265.

The Act, which largely codified a 1989 proposal by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,[5] essentially establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Report at 10 (emphasis added). The Act thus seeks to create an incentive for states to provide competent counsel throughout state collateral review, recognizing that such counsel is "crucial to ensuring fairness and protecting the constitutional rights of capital litigants." Powell Committee Report at 3240; *see also* House Report at 8; 137 Cong.Rec. at S3220 & S3222 (March 13, 1991) (Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991)

5. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim.L.Rep. (BNA) 3239 (Sept. 27, 1989) ("Powell Committee Report"); *see also* House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R.Rep. No. 23, 104th Cong., 1st Sess., at 16 ("House Report") ("Proposed 28 U.S.C. 2256 [codified as § 2261] sets out the basic conditions for states to 'opt in' to the Powell Committee procedures, by extending appointment of counsel for indigent capital defendants to state collateral proceedings."). Although the House issued this report in connection with the proposed 1995 Act, the relevant portions of the proposed 1995 Act are identical to the legislation signed into law.

[hereinafter "1991 Analysis"].[6] In exchange for adequately providing such competent counsel, Congress offered states a potentially available mechanism for ensuring expedited and final review of federal habeas corpus petitions. 1991 Analysis, 137 Cong.Rec. at S3220 & S3222; House Report at 8 & 10; Powell Committee Report at 3239.

3. The Harm Caused by Defendants' Conduct

In public statements both prior to and since enactment of Title I, throughout this litigation, and in other cases pending before federal courts in California, defendants and their agents have consistently and vigorously maintained that California qualifies for Chapter 154's benefits under § 2265's unitary review procedure. Defendants claim that California satisfies § 2265 by virtue of a "comprehensive scheme of interlocking, cross-implementive provisions." The qualifying mechanism, defendants claim, became effective on June 6, 1989, and consists primarily of the following: (1) Cal.Gov't Code § 68511.5 (effective Jan. 1, 1984), (2) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" ("Rules of Court") (effective Jan. 1, 1983), (3) Rule of Court 76.5 (effective Jan. 1, 1985), (4) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective Jan. 1, 1985), (5) the California Supreme Court Statement of Internal Operating Practices and Procedures ("IOPP") (Adopted Summer 1985, Revised December 1989, and in 1995), (6) the California Supreme Court Statement of Policies Regarding Cases Arising From Judgements of Death (the "June 6, 1989 Policies")

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6. The relevant provisions of the 1991 Act are also identical to the legislation signed into law.

(adopted June 6, 1989), and (7) *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993). Accordingly, defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class.

Absent judicial relief from this Court, defendants' threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153. As the Court has previously noted,

> Without a judicial determination of the rights and responsibilities of the parties to this action, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.
> ¶.
> California's eligibility to proceed under Chapter 154 literally may have life or death consequences for plaintiff and members of the proposed class
> . . .

Ashmus v. Calderon, No. C96-1533 TEH at 4-5 (N.D.Cal. May 24, 1996).

Plaintiffs will be forced to forfeit their rights under Chapter 153 as a direct result of the uncertainty over Chapter 154's applicability created by defendants' assertions. Defendants' statements during the course of this litigation leave little room for doubt that, absent judicial relief, they will continue to make such threats and assertions.

As a practical matter, defendants' assertions would thus secure for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats effectively deprive plaintiffs of their rights under chapter 153, and, arguably, under the Due Process Clause as well.[7]

As the Supreme Court recently observed, erroneously denying a state prisoner use of a first "federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human

7. Defendants' make the unrealistic and infeasible suggestion that plaintiffs can readily avoid any harm by acting as if Chapter 154 does apply in California, and then, if a Court subsequently determines that Chapter 154 does not apply, withdrawing any hastily filed petition and refiling it at a later date. Under such a scenario, plaintiffs' counsel will have to file and then refile piecemeal claims. Counsel will have to start and stop investigation and funding. Counsel will have no idea what time constraints exist with respect to discovery or how to plan a coherent investigation. Counsel will have no idea, in seeking discovery and fashioning an investigation plan, what rules and standards apply to the evidentiary hearing or on what bases relief may be granted. In the Court's view and experience, it is wholly unrealistic and, indeed, unworkable, for counsel to proceed effectively in such a fashion.

liberty." *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1299, (1996) (reversing the Eleventh Circuit's order vacating the lower court's stay of a state execution). Effectively forcing state prisoners to file hasty habeas corpus petitions, without providing the quid pro quo benefits of competent counsel, similarly risks injury to this important interest in human liberty.

To be sure, as the *Lonchar* Court recognized, Congress has the power to establish statutes of limitation on habeas filings. *Id.* at 1301. By enacting Chapter 154, Congress has exercised that power to make a six month limitation *potentially* applicable to states. Presumably, Congress could have made Chapter 154 applicable to all states, regardless of their provision of competent counsel to state prisoners for state collateral review. However, Congress has not done so, and it has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies to a given state.[8]

8. *See, e.g.*, Powell Committee Report at 3242 ("[I]t is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies . . . The final judgments as to the *adequacy* of any system for the appointment of counsel [], however, rests ultimately with the federal judiciary. . . . [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation.") (emphasis in original); 1991 Analysis, 137 Cong.Rec. at S3220 ("The latitude afforded to the states in defining specific standards of counsel competence is also desirable . . . [However], *[a]t a minimum*, the immediate benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added); *id.* at 3222 (pointing out that proposed § 2261, codified in the 1996 Act as § 2265, "would extend the chapter to states with adequate unitary review procedures") (emphasis added).

Defendants suggest that now that Congress has enacted such potentially applicable limitations, the Court would inappropriately impose hardship on California were it to exercise its equitable powers to enjoin California from receiving the benefits of the Act. However, the Supreme Court's cautioning against judicial action which "lightly" imposes a statute of limitation in the absence of congressional action, *Lonchar*, 116 S.Ct. at 1301, counsels equally against this Court allowing defendants to effectively impose a potentially applicable statute of limitation where it concludes that California does not qualify for such an application.

As the Supreme Court emphasized, "given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 1302. The same is true of California's allegedly comprehensive scheme, and of this Court's review of that scheme. As discussed below, however, California's scheme falls far short of this standard. Indeed, as the Ninth Circuit recently emphasized, the June 6, 1989 Policies that defendants contend constitute the core of the alleged scheme are "difficult to articulate," have been "applied only randomly," and were, at least until *In re Clark*, 855 P.2d 729 (1993), neither clear, nor well-established. *Morales v. Calderon*, 85 F.3d 1387, 1393 (1996) ("express[ing] no opinion as to whether the California Supreme Court has sufficiently narrowed the timeliness standards or applied them consistently since Clark").

Whether, as plaintiffs assert, defendants' effective deprivation of their rights under Chapter 153 constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 raises difficult legal questions. However, as a factual matter, the Court finds that defendants' threats have

caused plaintiffs to forgo their statutory rights and that, absent relief from this Court, defendants' threats will continue to cause such injury.

Any doubts as to whether defendants' assertions are causing plaintiffs to forego their rights under Chapter 153 are readily relieved by consideration of what plaintiffs' position in this regard would be if defendants had, instead, stated that they planned to establish a unitary review procedure that would allow them in the future to invoke Chapter 154's benefits. In such a situation, plaintiffs would not face the unconscionable dilemma discussed above, and would continue to exercise their statutory and constitutional rights. While Defendants certainly have a fundamental First Amendment right to express their views in this regard, the Court concludes that the manner in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so.[9]

4. Procedural Background

In the thirty days following plaintiffs' filing of this action on April 24, 1996, the Court held three hearings and received six rounds of briefing on the matter. On May 2, at the close of the show cause hearing on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," the Court granted plaintiffs' application for a

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9. Thus, for instance, it is clear that plaintiffs' rights have not been harmed by recent statements of elected officials regarding California's present efforts to reform its mechanism for providing competent counsel to capital defendants pursuing collateral review, even though the State presumably hopes to opt-in to Chapter 154 via these reforms. *See* Mike Lewis, *Capital Appeals Overhaul Starts With Money*, Daily J., May 28, 1996, at 1.

temporary restraining order ("TRO").[10] On May 13, at the close of the hearing on plaintiff's application for a preliminary injunction, the Court modified and extended the TRO for an additional ten days. *See Ashmus v. Calderon*, No. C96-1533 TEH (N.D.Cal. May 15, 1996) (Order Modifying and Extending TRO). And on May 24, one day after the hearing on plaintiff's expedited motion for provisional class certification, defendants' expedited motion to dismiss, and other matters raised in the parties' supplemental briefs, the Court issued a brief order addressing the outstanding issues presented by the parties.

In addition, on May 31, defendants filed an Ex Parte Application for Partial 5-Day Stay of Final Order and Judgment, for the sole purpose of facilitating defendants' anticipated application to the Ninth Circuit for a stay pending appeal. On June 3, Defendants filed an Ex Parte Application for Partial Stay of Final Order and Judgment Pending Appeal, asking the Court partially to stay its order, in lieu of defendants' seeking such a stay from the Ninth Circuit. In the event that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated by reference as Findings of Fact.

CONCLUSIONS OF LAW

In the event that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated by reference as Conclusions of Law.

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10. In the week following this Court's issuance of the TRO, defendants sought emergency stays from both the Ninth Circuit and the United State Supreme Court, and applied for an emergency writ of mandamus to the Ninth Circuit. Each of these requests was summarily denied.

I. PRELIMINARY ISSUES

Defendants have raised a number of threshold questions concerning the Court's power to hear this case, including challenges to plaintiffs' standing, the ripeness of their claims, and the existence of a cognizable cause of action. As the Supreme Court has explained, these issues are related to, but analytically distinct from the threshold question of jurisdiction.

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, see *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 384, 4 S.Ct. 510, 512, 28 L.Ed. 462 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951); *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available.

Davis v. Passman, 442 U.S. 228, 239 n. 18, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979) (emphasis in original).

A. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Section 1331 confers jurisdiction upon the Court over "all civil actions arising under the Constitution, laws, or treaties of the United States." A lawsuit "arises under" federal law if (1) federal law creates the cause of action, or (2) "the resolution of the dispute depends upon the validity, construction, or effect of federal law, so long as the federal question is a real and substantial issue." *City Nat. Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir.1982). Plaintiffs seek a declaratory judgment that Chapter 153, rather than the expedited provisions of Chapter 154, governs federal review of his state court conviction and death sentence. Thus, they have alleged facts sufficient to confer jurisdiction under either prong of this test: The Declaratory Judgment Act creates their cause of action, *see Samuels v. Mackell*, 401 U.S. 66, 70, 91 S.Ct. 764, 766, 27 L.Ed.2d 688 (1971) (declaratory judgment is "essentially an equitable cause of action"), and the dispute depends upon the construction and effect of the 1996 Act.

The Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3), because, as discussed below, plaintiffs have sufficiently alleged a cause of action under 42 U.S.C. § 1983.

B. Standing

Article III requires a plaintiff to be sufficiently adversary to a defendant to create an actual case or controversy. A plaintiff must show that he has personally suffered some actual or threatened injury as a result of the conduct challenged in the lawsuit, that the injury can be fairly traced to the challenged actions, and that the injury is likely to be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992).

Plaintiff Ashmus and each member of the plaintiff class satisfy these requirements. As noted above, plaintiffs are suffering "actual" injury because defendants have asserted, and, absent judicial relief, will continue to assert falsely that Chapter 154 governs plaintiffs' ability to file and pursue federal habeas proceedings. Because of the uncertainty created by defendants' assertions, plaintiff Ashmus will be forced to comply with Chapter 154 and to structure his habeas litigation accordingly. Other members of the plaintiff class will be similarly affected. The fact that the provisions of Chapter 154 could not directly apply to plaintiff until his "finalized" petition is filed at some point in the future is no more of a bar to standing than it is to ripeness. *See, e.g., New York v. United States*, 505 U.S. 144, 175, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992) (rejecting ripeness objections to New York's challenge of a statutory provision that, three and one-half years in the future, would require it to take title to low-level radioactive waste on the grounds that "New York must take action now in order to avoid the take title provision's consequences"). Thus, plaintiffs are suffering "actual" injury, and that injury can be fairly traced to defendants actions. Accordingly, plaintiffs satisfy Article III's case or controversy requirement.[11]

Defendants challenge to plaintiffs' standing focuses almost entirely on the fact that the six-month statute of limitations created by Chapter 154, *see* 28 U.S.C. § 2263(a), which defendants believe "began running on April 24, 1996, as to plaintiff and all other death row inmates

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11. Defendants do not dispute that plaintiffs satisfy the redressability prong of standing.

whose judgments were affirmed on or after June 6, 1989,"[12] expires after August 2, 1996, the presumptive filing deadline for plaintiff Ashmus at the time that he filed the instant action.[13] However, defendants ignore the fact that plaintiff Ashmus must be afforded the right to understand the consequences of filing such a petition. Plaintiff must know, prior to drafting the finalized petition, whether 28 U.S.C. § 2264's limitations on federal courts' substantive review of habeas petitions ultimately will apply to the Court's review of his constitutional claims. He must also know whether to file a petition, as ordered by this Court, that contains exhausted and unexhausted claims. Finally, plaintiff must know whether § 2266's rigid time limitations for adjudication of his petition apply.

C. Ripeness

The basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . ." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). To achieve this purpose, the doctrine sets forth a "twofold" analysis, requiring the Court to balance "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515. Both parts of this balancing test strongly favor the Court's resolution of the present dispute.

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12. Defs.' Supp.Briefing at 7 n. 5.

13. Although this filing deadline has since been vacated, plaintiff cannot rely on this fact to establish that he had standing when he filed this action.

The first part of the test examines the extent to which the issues are sharply focussed. Where, as here, the issue for analysis is, as defendants' acknowledge, "a virtually pure question of law," the issues are generally considered to be sufficiently focussed. *Id.*; *see also Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 300-01, 99 S.Ct. 2301, 2309-10, 60 L.Ed.2d 895 (1979) (noting that in such cases, postponement serves no purpose); *id.* at 303-04, 99 S.Ct. at 2311-12 (noting that, by contrast, postponement is appropriate where precise factual circumstances will affect constitutional analysis). That some of the plaintiffs may be able to exercise control over some of the harm alleged (e.g., by filing petitions prior to the deadline) does not alter this conclusion. *Id.* at 303-05, 99 S.Ct. at 2311-12; *Clements v. Fashing*, 457 U.S. 957, 961-62, 102 S.Ct. 2836, 2842-43, 73 L.Ed.2d 508 (1982).

Plaintiffs similarly satisfy the second prong of the ripeness test, the hardship factor. "The most important aspect of the hardship determination is a clear recognition that a decision of legal relationships often should be available before irrevocable commitments are made." 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3532.4, at 167 (2d ed. 1984). As noted above, plaintiffs have convincingly demonstrated to the Court that, absent judicial relief, they will need to make such commitments with regard to their litigation resources and strategies. The impact of defendants' conduct on plaintiffs is thus "sufficiently direct and immediate to render the issue appropriate for judicial review at this stage." *Abbott*, 387 U.S. at 152, 87 S.Ct. at 1517.

Defendants' ripeness challenge rests primarily on their statute of limitations argument, rejected above, and

on their belief that, regardless of Chapter 154's applicability, the Act's revised standards of review will apply to plaintiff Ashmus based on the Act's amendments to Chapter 153. *See* Act, Pub.L. 104-132, § 104(3)-(4), 110 Stat. 1219 (revising 28 U.S.C. § 2254(d)-(e)). Plaintiffs persuasively contest the latter point and request that,

> to ensure that an appellate court does not misunderstand this Court's view of the "standing" and "ripeness" issues raised by defendants and the scope of the relief requested, this Court should declare that the amendments to Chapter 153 do not apply to plaintiff Ashmus and the approximately 144 other California death row inmates who invoked federal habeas jurisdiction prior to April 24, 1996.

Pls.' Reply to Class Cert. at 3 n. 2.

For the reasons set forth in plaintiffs' First Reply, and in the thorough retroactivity analysis in *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1502-1506 (W.D.Mo., 1996),[14] the Court agrees that the relevant provisions of

14. *See also, e.g., Williams v. Calderon*, 83 F.3d 281, 286 & n. 2 (9th Cir.1996) (noting that "the Act does not provide an effective date for the general habeas provisions [i.e., Chapter 153]" and assuming, "without deciding, that section 2253(c)(2) of the Act does not apply retroactively . . ."); *Warner v. United States*, 926 F.Supp. 1387, 1390 (E.D.Ark.1996) (holding that amendments to § 2255 do not apply retroactively); *United States v. Trevino*, 1996 WL 252570 n. 1 (N.D.Ill. May 10, 1996) (same); *Centanni v. Washington*, 1996 WL 251438 at *1 (N.D.Ill. May 8, 1996) (expressing doubt that amendments to Chapter 153 apply retroactively); *Schlup v. Bowersox*, No. 4:92CV443-JCH at 17 (E.D.Mo. May 2, 1996) (holding that Congress did not intend the amendments to § 2254 to apply retroactively); But *see Leavitt v. Arave*, 927 F.Supp. 394, 398 (D.Id.1996) (concluding that applying

the Act, § 104, do not apply retroactively. Accordingly, the Court holds that s 104's amendments to 28 U.S.C. § 2254 do not render the present controversy unripe.

Nonetheless, the Court rejects plaintiffs' suggestion that it should therefore declare Chapter 153, either in whole, or in part, inapplicable to plaintiffs. Plaintiffs' complaint does not explicitly pray for such relief. In the absence of such a prayer, the Court does not believe that such relief is warranted.[15]

D. Cause of Action

"The concept of a 'cause of action' is employed specifically to determine who may judicially enforce the statutory rights or obligations." *Davis v. Passman*, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979). The key question is whether a particular plaintiff is a

amended versions of §§ 2244, 2253, and 2254 to pending cases would not have retroactive effect); *Bean v. Calderon*, No. CIV S-90-0648 WBS/GGH at 7 (E.D.Cal. May 8, 1996) (applying amended § 2254 to a pending case without discussing its retroactivity); *Williams v. Calderon*, No. CV. F- 89-160-REC-P, at 5-7, 9, 16-17 (E.D.Cal. April 29, 1996) (holding, in the alternative, that certain provisions of Chapter 153 apply retroactively), affirmed on other grounds, *Williams v. Calderon*, 83 F.3d 281 (9th Cir.1996).

15. Concededly, plaintiffs' complaint and moving papers manifest their assumption that Chapter 153 would not apply retroactively. Defendants' ripeness challenge similarly manifests defendants' assumption that Chapter 153 did apply retroactively to pending cases. Accordingly, to the extent that the retroactivity of Chapter 153 impacts the ripeness issue, the Court is obligated to resolve the issue in determining the justiciability of the instant action. However, with respect to Chapter 153's retroactivity, plaintiffs have failed to explain why the Court is similarly obligated to exercise its discretionary jurisdiction to grant the declaratory relief they requested in subsequent briefing.

member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court. The answer "depends not on the quality or extent *1062 of [plaintiffs'] injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts." *Id.* at n. 18.

The Court concludes that plaintiffs fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act. *See Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 119, 110 S.Ct. 444, 455-56, 107 L.Ed.2d 420 (1989) (Kennedy, J., dissenting); *Samuels v. Mackell*, 401 U.S. 66, 70, 91 S.Ct. 764, 766-67, 27 L.Ed.2d 688 (1971) (declaratory judgment is "essentially an equitable cause of action"); Fed.R.Civ.P. 57, 1937 Advisory Committee Notes ("The existence or nonexistence of any right . . . may be declared."). Unquestionably, plaintiffs also fall within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapters 153 and 154.

Whether plaintiffs also have stated a cause of action cognizable under 42 U.S.C. § 1983 presents a more difficult question. Plaintiffs contend that the existence of a § 1983 cause of action in this case is controlled by a straightforward application of *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). *Steffel* and its progeny, *see, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 625 n. 1, 106 S.Ct. 2718, 2722 n. 1, 91 L.Ed.2d 512 (1986); *Carey v. Population Services Int'l.*, 431 U.S. 678, 683 n. 3, 97 S.Ct. 2010, 2015 n. 3, 52 L.Ed.2d 675 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-32, 95 S.Ct. 2561, 2567-68, 45 L.Ed.2d 648 (1975); *Fordyce v. Seattle*, 55 F.3d 436, 440 (9th Cir.1995), involved threatened prosecution or

administrative action under a state or local law claimed by plaintiff to be unconstitutional. In each case, the Court held that the fact that state courts might, in the event of prosecution, find the state law unconstitutional did not prevent the threatened prosecution from qualifying as state action creating a federal cause of action pursuant to 42 U.S.C. § 1983. Thus, it is clear that in appropriate circumstances, the threats of state officials to assert an unlawful legal position can give rise to a cause of action under § 1983.

Focussing on the nature of the challenged state action, defendants have pointed out several reasons why these cases are potentially distinguishable from the instant case. The Court recognizes that applying the principles underlying *Steffel* to the instant case represents a novel application. However, the Court believes that defendants have misperceived the relevance of these cases to the instant action. The relevant focus is not the nature of

state action,[16] but the nature of the harm that Steffel and other courts have held to be cognizable under § 1983.

> [T]he Supreme Court has mandated that Section 1983 be "'broadly construed against all forms of official violation of federally protected rights.'" *Dennis v. Higgins*, 498 U.S. 439, 444, 111 S.Ct. 865, 869, 112 L.Ed.2d 969 (1991), *quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701, 98 S.Ct. 2018, 2040-41, 56 L.Ed.2d 611 (1978). Threatened harm that has not yet occurred, but that will occur unless judicial relief is afforded is enough to support a civil rights claim. *See, e.g., Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 431-32, 107 S.Ct. 766, 774-74, 93 L.Ed.2d 781 (1987).

Thorsted v. Gregoire, 841 F.Supp. 1068, 1083 (W.D.Wa.1994), aff'd, 75 F.3d 454 (9th Cir.1996). Accordingly, the Court believes that the mere fact that another actor--whether it's the state court in the threatened prosecution cases, or the federal court in the instant case--may limit the harm caused by defendants' conduct does not defeat a cause of action under 42 U.S.C. § 1983.

In *Steffel*, the uncertainty caused by state officials' threats to prosecute plaintiff under an allegedly unconstitutional statute caused plaintiff to forego his First Amendment rights to free speech. In *Thorsted*, the uncertainty created by state officials' threats to enforce an allegedly unconstitutional term limits measure caused plaintiffs to forego rights secured by the First and Fourteenth Amendments, as well as the Qualifications Clause. In the instant case, the uncertainty created by defendants' threats is causing plaintiffs to forego their rights, under Chapter 153, not to be executed without a federal court's determination that their conviction and sentence does not offend the U.S. Constitution. The denial of these rights "is a particularly serious matter . . . , risking injury to an important interest in human liberty." *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996).

Defendants have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting

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16. Plaintiffs have adequately alleged the presence of state action, as defendants, at one point at least, seemed to concede. *See* Defendants' 2d Opp.Mem. at 4 ("[Plaintiff] observes that state officials 'act under color of state law' when they litigate, a proposition we do not dispute.") Defendants subsequently cited to *Rosas v. Brock*, 826 F.2d 1004 (11th Cir.1987), for the proposition that any relevant conduct of theirs in this case is action "under color of federal law."

In *Rosas*, the State of Florida entered into a contractual agreement with the federal government to administer the Disaster Unemployment Assistance Program. Pursuant to the federal agreement, state employees reviewed unemployment applications, applied federal regulations, and determined that Mr. Rosas was ineligible for federal aid. Noting that "the challenged action by state employees is nothing more than the application of federal rules," the Eleventh Circuit concluded that "the federal involvement in those cases is so pervasive that the actions are taken under color of federal and not state law." *Id.* at 1007 (emphasis added). Here, however, the involvement of the federal judiciary has been triggered by state officials' independent assertions of the state's eligibility under Chapter 154. As noted above, defendants' conduct thus constitutes the heart of the dispute. Accordingly, "the state cannot be characterized as a purely passive actor so as to preclude Section 1983 liability." *Mitson v. Coler*, 670 F.Supp. 1568, 1576 (S.D.Fl.1987); *see also Martin v. Heckler*, 773 F.2d 1145, 1154 (11th Cir.1985) (en banc).

principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, "death is [] different." *Cf.* 13A Wright, Miller, & Cooper, Federal Practice and Procedure § 3532.5 at 185 (2d Ed.1984) (noting, in the related context of ripeness, that courts' "willingness to protect against even prospective burdens of compliance is enhanced if especially valuable interests seem to be at stake"). Thus, while the cognizability of plaintiffs' § 1983 cause of action is not entirely free from doubt, the Court concludes that, in the context of this case, plaintiffs have raised sufficiently serious questions to warrant the preliminary injunctive relief requested.

II. CLASS CERTIFICATION

On May 6, 1996, pursuant to Civil Local Rules 7-10 and 23-2, plaintiffs moved on an expedited basis to have their motion for provisional class certification heard on May 13, together with the preliminary injunction hearing already scheduled for that time. In response to defendants' vigorous objection that a May 13 hearing would not allow sufficient time to undertake the "rigorous analysis" required under Rule 23, *see General Telephone of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982), the Court set the class certification hearing for ten days later, on May 23. The Court notes however, that defendants' brief analysis of the requirements of Rule 23(a) and their failure even to mention, in their brief, two of the bases proposed by plaintiff to maintain this action under Rule 23(b), belies their suggestion that anything less than the "normal" 35-day briefing schedule provided for by this Court's local rules would prejudice their ability to address the merits of

class certification.[17] *See* Defs.' Opp'n to Exp.Mot. at 4-5.

Plaintiff seeks to certify a class consisting of all prisoners who have been sentenced to death by the State of California and are currently awaiting execution. To qualify for class certification, plaintiff must first satisfy the four prerequisites enumerated in Fed.R.Civ.P. 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In addition to these prerequisites, plaintiff must satisfy one of the bases for maintaining a class action listed in Rule 23(b).

Plaintiff bears the initial burden of demonstrating that Rule 23's requirements have been met. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.1994); *see also, Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975) (noting that because class certification inevitably involves some speculation, plaintiff need only present "sufficient information [for the court] to form a reasonable judgment"), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976). The district court has broad discretion in determining whether to certify a class,

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17. Defendants' opposition to class certification focussed largely on the standing of named plaintiff Troy Ashmus to bring this suit, and on the ripeness of his claim. Defendants are free to present any arguments they deem appropriate, and standing and ripeness are, of course, threshold concerns in every suit. The jurisdictional arguments addressed in the first two-thirds of defendants' opposition to class certification, however, had already been addressed and explored in the parties' earlier oral and written arguments.

Defendants' comments are also at odds with their efforts to get this case to the appellate level as soon as possible and their unwillingness, at the May 3 hearing, to stipulate to a period longer than 10 days for the TRO.

however, and its determination "should not be overturned on review unless it is shown that the district court abused its discretion." *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 382 (9th Cir.1979), cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980). The Court concludes that plaintiff has met his burden and that provisional certification is warranted in this case.

A. Rule 23(a)

1. Numerosity

Plaintiffs seek to certify a class consisting of all prisoners who have been sentenced to death by the State of California. By its express terms, Chapter 154 applies, in qualifying states, to all members of the class who petition for habeas corpus in federal courts. 28 U.S.C. § 2261(a) ("This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence."). Plaintiffs assert that the class contains approximately 439 persons, with approximately two unknown members being added to the class each month.[18] Defendants do not dispute plaintiffs' numerical estimates. Rather, they contend that the appropriate class consists only of the approximately 52 death row inmates who, like plaintiff, have state death judgments that became final after June 6, 1989, and who have not yet filed federal habeas corpus petitions. Having thus redefined the class, defendants claim that plaintiffs fail to satisfy the numerosity requirement because death row inmates in California are easily located, easily identified, and "are engaged in litigation or will be." Defs.' Opp'n to Class Cert. at 10-11.

18. Pls.' Compl ¶ 20; Defs.' 1st Opp'n. at 7 n. 1.

Defendants correctly note that the *current* members of the class are easily identified and easily located. However, for several reasons, their claim that class representation is thus inappropriate lacks merit. First, solely by virtue of the undisputed fact that two to three "unnamed and unknown future" persons are being added to the class each month, joinder in this case is "inherently impracticable." *Jordan v. Los Angeles County*, 669 F.2d 1311, 1320 (9th Cir.), vacated on other grounds, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). Second, while there is no exact numerical formula for determining whether a class is sufficiently numerous, *see, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981), the Ninth Circuit has indicated that even by defendants' own estimate of 52 class members, the numerosity requirement is satisfied here. *Jordan*, 669 F.2d at 1319 (reversing district court's denial of class certification and noting that "we would be inclined to find the numerosity requirement in the present case satisfied *solely* on the basis of the number of ascertained class members, i.e., 39, 64, and 71") (emphasis added). Third, given the undisputed fact that more than a quarter of the proposed class members are without counsel and likely to remain so for some time,[19] the likelihood that these individuals will engage in litigation against defendants at some point in the future hardly renders their joinder in this action practicable.

Defendants' efforts to redefine the class similarly lack merit. With one exception, these efforts are based on distinctions between class members that are irrelevant to the requirements of Rule 23. First, as discussed below, all members of the proposed class share common questions of law and of fact. Second, defendants' claim that the

19. Defs.' 1st Opp'n Mem. at 16; Pls.' Ex. 5 at A1.

proposed class members whose cases are currently pending in state court have no cause of action and therefore should not be included in the class runs directly counter to Supreme Court precedent. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732 (1974) ("In determining the propriety of a class action, the question is not whether . . . the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (quoting *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir.1971)). In addition, defendants ignore the fact that Chapter 154's applicability will affect these individuals' decisions about how best to preserve federal habeas review of constitutional claims, when and whether to seek certiorari, and whether they are entitled to "reasonable litigation expenses." Third, defendants' suggestion that prisoners who have already filed federal habeas petitions should be excluded from the class, presumably because the filing deadline will not apply to them, ignores the remaining provisions of Chapter 154 that Congress expressly made applicable to pending capital habeas petitions. Death Penalty Act, Pub.L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996) (Chapter 154 "shall apply to cases pending on or after the date of enactment of this Act.").

Defendants have raised one important distinction, however, that the Court's May 24 order did not sufficiently take into account. During the course of this litigation, defendants have conceded that California's alleged comprehensive scheme does not apply to death row inmates whose judgments became final prior to June 6, 1989. Accordingly, defendants argued, these inmates will "not be subjected to any 'unlawful' argument by state officials about the application of federal law." Defs.' Opp'n to Class Cert. at 10.

Based on plaintiffs' contentions that these concessions contradicted some of the very assertions by defendants that gave rise to this action, and on the Court's own concerns that defendants' concessions might not be legally enforceable in subsequent actions, the Court provisionally included such persons in the certified class. Upon reconsideration, however, the Court concludes that the roughly 50 persons whose judgments were affirmed prior to June 6, 1989, should *not* be included in the class. Accordingly, and good cause appearing, the Court hereby MODIFIES the provisionally certified class to exclude such individuals.

2. Commonality

The existence of common questions of law alone, or of fact alone, satisfies the commonality requirement. *Cottrell v. Virginia Elec. & Power Co.*, 62 F.R.D. 516, 519 (E.D.Va.1974). The requirement is met by the alleged existence of a common practice by defendants; the defendants' actions need not affect each member of the class in the same way. *Arnold*, 158 F.R.D. at 448. Whether Chapter 154 applies in California and whether defendants' assertions in this regard are harming death row inmates in California are the central questions presented by this case. Standing alone, these questions, which plaintiffs have demonstrated are common to all members of the class, satisfy the commonality requirement. Nehmer v. U.S. Veterans' Admin., 118 F.R.D. 113, 117 (N.D.Cal.1987) ("Courts have frequently certified classes whose members share a common threat of future harm.").

Plaintiffs' complaint and brief list a litany of additional factual and legal questions that are common to members of the class. Pls.' Compl. ¶¶ 21-22; Pls.' Class Cert. Mot. at 6 (e.g., whether California has a unitary

review procedure; whether California has a statute or rule providing for standards of competency for the appointment of counsel in unitary review procedures; whether defendants have threatened to assert that Chapter 154 applies to all or some members of the class; whether, if California has the appropriate mechanisms and rules required by 28 U.S.C. § 2265, it has broadly failed to comply with the specific requirements of those mechanisms and rules; and whether California has entered an order by court of record appointing counsel for all indigent death row inmates who have accepted offers of counsel).

Defendants have not specifically objected to the commonality of any of these questions. Rather, they have simply asserted that because "plaintiff has no existing case or controversy with defendants on the issue of Chapter 154's application[,] [h]e therefore presents no questions of law and fact common to or typical of the proposed class." Defs.' Opp'n to Class Cert. at 12-13. As noted above, the Court has concluded that plaintiff has standing. The Court hereby finds that the questions of law and of fact identified by plaintiffs are indeed common to all members of the plaintiff class. Accordingly, the Court holds that plaintiffs have satisfied the commonality requirement.

3. Typicality

The typicality requirement is satisfied if the "class representative[s] ... possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977). Typicality does not require that the named plaintiff's claims be identical to those of the other class members. Moreover, a finding of commonality will ordinarily support a finding of typicality. *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370

n. 13. Aside from the jurisdictional arguments previously rejected by the Court, defendants have failed to identify any manner in which the class representative's claims or defenses are atypical. The Court finds that the class representative possesses the same interests and suffers the same injury as other class members. Accordingly, plaintiffs have satisfied the typicality requirement.

4. Adequacy

Two factors are considered in determining whether a case satisfies the requirement of fair and adequate representation. First the class representative's interests must be coextensive with and not antagonistic to the interests of the remainder of the class. Second, plaintiff's counsel must be fully competent to prosecute the action as a class action. *Jordan*, 669 F.2d at 1322. "[T]he attorney's zeal, competence, and experience are factors relevant to the District Court's exercise of discretion" in the appointment of counsel. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 43 (N.D.Cal.1977).

Defendants do not appear to contest that plaintiffs have satisfied this requirement. The Court finds that the named plaintiff's interests in challenging the applicability of Chapter 154 are identical to the interest of the remainder of the proposed class.[20] Moreover, plaintiffs'

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20. At oral argument, defendants did appropriately note that the Court should not assume that all members of the proposed class will necessarily oppose application of Chapter 154's requirements to their habeas corpus petitions. Defendants may be correct, but this speculation hardly suffices to show that class certification is unwarranted. *See, e.g., Probe v. State Teachers' Retirement System*, 780 F.2d 776, 781 (9th Cir.) (noting that the fact that some class members may believe a challenged state retirement plan is legal does not create "conflict" sufficient to render class certification improper), cert. denied, 476 U.S. 1170 (1986).

counsel are fully competent to prosecute this case in a class action. Numerous state and federal courts, including this Court, have appointed the attorneys for plaintiffs to represent indigent prisoners under sentence of death. The Court finds that plaintiff has satisfied the adequacy requirement.

B. Rule 23(b)

In addition to satisfying the prerequisites listed in Rule 23(a), plaintiff must demonstrate that this action falls within one of the three categories enumerated in Rule 23(b). So far as relevant here, Rule 23(b) is satisfied where:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b).

Here, plaintiffs seek to maintain the action under either Rule 23(b)(1) or 23(b)(2). To satisfy subsection (b)(2), two factors must be present: (1) the defendants' action or refusal to act must be generally applicable to the class; and (2) injunctive and declaratory relief must be requested for the class. Plaintiffs have clearly demonstrated that both factors are present. First, defendants conduct, the assertions that California satisfies the opt-in provisions of Chapter 154, affect each member of the class, and indeed, have been directed at each member of the proposed plaintiff class. *See Christman v. American Cyanamid Co.*, 92 F.R.D. 441, 453 & n. 34 (N.D.W.Va.1981) (defendants conduct is "generally applicable" to the class if the defendant has adopted a pattern of activity that is likely to be the same as to all members of the class; "defendant need not have acted directly against each member of the class"). Second, plaintiffs have alleged, and the Court has concluded, that injunctive and declaratory relief are appropriate with respect to the class as a whole. The Court notes that Rule 23(b)(2) was specifically drafted to facilitate vindication of civil rights, particularly where, as here, that vindication can be remedied through injunctive relief. *See* Rule 23, Advisory Committee's Note to the 1966 Amendments; *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir.1980).

This action is also appropriately maintained under both bases listed in subparagraph (b)(1). Defendants did not address either basis in their papers, although they did assert at oral argument that plaintiffs failed to satisfy the requirements. The Court disagrees. Prosecution of separate actions by or against plaintiffs would create precisely the risk of inconsistent adjudications and the resultant incompatible standards of conduct for defendants that the Rule was expressly designed to prohibit. Indeed, at the May 13 hearing, defendants argued that the Court

should refrain from enjoining defendants for this very reason: so that other district courts would have the opportunity to reach a different conclusion regarding the applicability of Chapter 154. Similarly, Rule 23(b)(1)(B) is satisfied here because adjudications with respect to individual members would, "as a practical matter, be dispositive of the interests of the other class members." Fed.R.Civ.Pro. 23(b)(1)(B). For instance, were a district court to find that California qualified under Chapter 154, nonparty class members would, as a practical matter, have no choice but to comply with 28 U.S.C. § 2263(a)'s filing deadline. If the Ninth Circuit or the Supreme Court subsequently held otherwise, the nonparty class members would have effectively foregone their rights under Chapter 153 without any opportunity to litigate the matter.

C. Legitimacy of Class Action in This Case

At the May 23 hearing, defendants for the first time raised two additional arguments in opposition to class certification. First, defendants claimed that class certification is usually used for a "terminal purpose." In the instant case, by contrast, defendants claim that plaintiffs' sole purpose in seeking class certification is momentarily to "disrupt" all pending federal capital habeas proceedings in California to resolve Chapter 154's applicability, and then to send the cases back to the district courts where they are currently pending. Second, and relatedly, defendants suggest that by granting plaintiffs' requested relief, the Court would somehow inappropriately or illegitimately deprive other federal district courts in California of their independent duty and responsibility to address the applicability of Chapter 154.

Defendants have neither briefed nor cited authority for either proposition. With respect to the first objection, the Court notes that, even assuming, arguendo, that class

certification is only appropriate where the suit will terminate the controversy between the parties,[21] this case certainly satisfies that requirement. Plaintiffs have asked the Court to declare whether Chapter 154 applies to all state prisoners sentenced to death in California. Whether the Court answers affirmatively or negatively, its answer will terminate the controversy over this question.

With regard to defendants' second objection, the Court is mindful of the limitations that Article III and Congress have imposed upon its jurisdiction. The Court is also sensitive to both the appearance and the reality of any action that might somehow illegitimately or inappropriately impose its view on its sister district courts. At the same time, however, the Court bears an obligation to resolve questions properly brought before it by litigants.

In this case, plaintiffs have availed themselves of two devices created by Congress to help litigants in appropriate circumstances: the "remedial arrow" of the Declaratory Judgment Act, *see Wilton v. Seven Falls Co.*, 115 S.Ct. 2137, 2143 (1995), and the expediency and economy of Rule 23's various mechanisms for bringing a class action, *see Falcon*, 457 U.S. at 155. The Court believes that it is obligated to resolve the question as plaintiffs have presented it. The Court has done so, to the best of its ability. If the Court is mistaken, the appellate courts will correct it. In the interim, the Court's decision

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21. The Supreme Court's decision in *Eisen* strongly suggests that no such additional requirement exists. *See Eisen, supra*, 417 U.S. at 178, 94 S.Ct. at 2153 (1974) ("In determining the propriety of a class action, the question is ... whether the requirements of Rule 23 are met.") (internal citations omitted); *see also Garcia*, 618 F.2d at 267 ("Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23.") (emphasis added).

may constrain the ability of other co-equal district court judges to decide the issue differently. Far from being an illegitimate or inappropriate exercise of its power, however, the Court believes that it was obligated to reach such a decision.[22]

In the end, defendants' second objection simply restates their repeatedly expressed belief that Troy Ashmus should have brought this controversy before the Court through a different vehicle (i.e., by way of a motion in his federal habeas proceedings currently before the Court in *Ashmus v. Calderon*, C93-0594 TEH). Had plaintiff done so, the Court's decision would not have directly affected other district courts' resolution of Chapter 154's applicability to California. However, plaintiff did not bring the motion as defendants would have liked. Instead, plaintiff brought this action. The Court is required to resolve the question as it in fact was presented, not as defendants wish it had been presented.

D. Conclusion

For the reasons discussed above, and good cause appearing, plaintiffs shall provisionally maintain this matter as a class action on behalf of a class consisting of the following persons:

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22. Although neither party briefed the issue, the Court notes that its jurisdiction under the Declaratory Judgment Act is discretionary. *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995). After reviewing the factors raised in *Karussos*, however, the Court has concluded that, at the very least, exercise of its discretionary jurisdiction is proper in this case; indeed, the Court believes, failure to exercise its jurisdiction in this case would arguably be an abuse of that discretion.

All prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending resolution of their state and federal challenges to their state convictions and sentences, except those such persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989.

Plaintiff Troy A. Ashmus shall be the named class representative. The Court shall retain the power to modify, amend, or revoke the class certification throughout the pendency of the action.

III. STATUTORY FRAMEWORK

A. Overview

As noted above, Chapter 154 provides two "opt-in" procedures, the so-called "post-conviction" procedure (§ 2261) and the "unitary review" procedure (§ 2265). Defendants concede, and the Court has previously held, that California does not qualify under § 2261's "post-conviction" procedure. California's eligibility for Chapter 154's benefits thus depends on whether the state has complied with the provisions of § 2265.[23]

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23. Plaintiffs contend that § 2261 sets forth basic requirements that also apply to states opting in under s 2265's unitary review procedure. Viewed in isolation, the language of § 2261(a) appears to support this interpretation: "This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply *only if* the provisions of subsections (b) and (c) are satisfied." 28 U.S.C. § 2261(a) (emphasis added). Congress' use of the term "only" suggests that independent of any requirements for unitary review established in § 2265, any opt-in procedure must satisfy § 2261(b) and (c) to qualify the state for the benefits of Chapter 154.

The threshold question for determining compliance with § 2265 is whether the state has created "a 'unitary review' procedure." If a state has a unitary review procedure, then it qualifies under § 2265 if (1) "the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings," § 2265(a); (2) "The rule of court or statute [] provides standards of competency for appointment of such counsel," *id.*; and (3) the State also properly establishes the requisite mechanism for offering and appointing counsel pursuant to § 2265(b). Failure to comply with any of these mandatory requirements is fatal to a state's ability to opt-in under § 2265.

B. Does California Authorize Unitary Review?

"A 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral

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However, the Court rejects this reading, for two reasons. First, it would render the entirety of § 2265 mere surplusage, in direct contravention of s 2265(a)'s provision that "*This chapter shall apply* , as provided in this section, in relation to a State unitary review procedure" that complies with the additional requirements of section 2265. Second, it is impossible for a case to simultaneously satisfy the requirements of § 2261(b) and the requirements of § 2265(a). The Court's reading is also supported by the fact that § 2261(a)'s "only if" language comes from the Powell Committee's original 1989 report, whereas § 2265's unitary review procedure was added later to "extend the potential application of the [Powell Committee's] proposed procedures to states having 'unitary review' systems in capital cases." 1991 Analysis, 137 Cong.Rec. at S3221-22. Accordingly, except insofar as § 2261(c) is expressly incorporated by § 2265(b), the Court holds that § 2261 is inapplicable here.

attack." § 2265(a). Focussing on the term "unitary review," plaintiffs interpret this provision to mean that the state must allow collateral issues to be reviewed in the same proceeding or proceedings as the direct appeal. In other words, plaintiff claims, unitary review means a "single procedure affording identical substantive review and disposition of direct review and collateral claims." Pls.' Mem. at 9.

The plain language of the statute, however, provides that the State procedure need only "*authorize*[] a person under sentence of death to *raise*, in the course of direct review of the judgment, such claims ..." § 2265(a) (emphasis added). "When a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992).

Several references in the legislative history also support the view that California has the type of unitary review procedure that would potentially qualify states for the benefits of the Act.[24/] The utility of this legislative

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24. House Report at 18 ("Proposed 28 U.S.C. § 2261 [codified as § 2265] contains provisions that make the Powell Committee procedures *potentially* applicable to states, such as California, which have adopted unitary review systems in capital cases that involve review of collateral claims concurrently with direct review of the judgement.") (emphasis added); 1991 Analysis, 137 Cong.Rec. at § 3221 (March 13, 1991) ("California, for example, has adopted a unitary review procedure for capital cases by rule of its Supreme Court"); Daniel E. Lungren, Report on Death Penalty Habeas Corpus Reforms, 137 Cong.Rec. S8716, S8717 (June 26, 1991) ("Lungren Report") ("California has adopted a unitary review procedure in capital cases."); see also Defs.' Ex. N. at 10, Minority Report of A.B.A. Task Force on Habeas Corpus Reform Co-Chairman Malcolm M. Lucas, reprinted in Ira P. Robbins, "Toward A More Just and

history is undermined, however, by the fact that many of the same speakers made statements supporting plaintiffs' view.[25] This very inconsistency demonstrates precisely why legislative history is never dispositive, and is only resorted to when congressional intent is not clear from the face of the statute. Here, congressional intent is clear from the face of the statute. The procedure, to qualify, need only authorize persons under sentence of death to raise such claims as could otherwise be raised collaterally.

California authorizes capital petitioners to raise such claims during the course of direct review. *See* June 6, 1989 Policies, Timeliness Standards 1-1 to 1-1.2; *see also, e.g., In re Neely*, 6 Cal.4th 901, 906, 922, 26 Cal.Rptr.2d 203, 864 P.2d 474 (1993); *People v. Mayfield*, 5 Cal.4th 142, 197, 209, 19 Cal.Rptr.2d 836, 852 P.2d 331 (1993),

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Effective System of Review in State Death Penalty Cases", 40 Am.U.L.Rev. 1, 200 (1990) ("[The California Supreme Court] promulgated standards ... requiring appellate counsel in capital cases to promptly 'investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus' and to file such petition 'without substantial delay' (concurrent with the appeal, if possible).") (quoting June 6, 1989 Policies, Timeliness Standard 1).

25. *See, e.g.*, Lungren Report, 137 Cong.Rec. at S8717 (The proposed Act "[a]uthorizes [a] state unitary procedure in which appeal and collateral review are handled in [a] *single proceeding* ..."); 1991 Analysis, 137 Cong.Rec. at S3221-22 ("Proposed 28 U.S.C. § 2261 [codified as s 2265] ... would extend the potential application of the proposed procedures to states having 'unitary review' systems for capital cases ... [that] *combine* the normal functions of direct review and collateral attack in a 'unitary review' procedure.") (emphasis added); *see also*, 137 Cong.Rec. S18665, S18674 (Nov. 27, 1991). Interestingly, defendants adopted the identical view in another case in this district. "Section 2265 requires the State to establish a mechanism for appointing counsel with the authority to handle a direct appeal and collateral review in a single proceeding." Pls.' Ex. 7, *Odle v. Calderon* C88-4280 CAL (N.D.Cal.), Resp.Brief at 5 n. 3 (filed April 26, 1996) (emphasis added).

cert. denied, 512 U.S. 1253, 114 S.Ct. 2780, 129 L.Ed.2d 892 (1993). Indeed, although plaintiffs have presented evidence that the California Supreme Court rarely reviews collateral claims together with the direct appeal, exercises seemingly standardless discretion in allowing consolidation of the two types of claims, and does not authorize payment for appointed counsel to investigate all collateral claims, plaintiffs do not seriously dispute that persons sentenced to death are authorized to raise such claims during the pendency of the direct appeal.[26]

Accordingly, the Court holds that California has a unitary review procedure, as that term is defined in the Act. As explained below, however, the Court also concludes that California's alleged comprehensive scheme fails to satisfy the remaining requirements of section 2265, for several independent reasons.

C. Does California have a qualifying mechanism for appointment and compensation of competent counsel?

California's alleged "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" expressly precludes compensation for raising certain collateral issues. Appellate counsel's

> duty to investigate [factual and legal grounds for the filing of a habeas petition] is *limited* to

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26. In response to the Court's question whether any unresolved factual issues prevent the Court's issuance of final declaratory relief, however, plaintiffs did allege that they can show "that although the state court may not make it 'official,' it routinely has effectively decided the appeal before the habeas petition is filed." Pls.' Supp. Brief at 15.

> investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, *nor does it authorize* the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment.

June 6, 1989 Policies, Timeliness Standard 1-1. (emphasis added). In other words, appointed counsel's duty "is limited [ ] to an investigation of potentially meritorious grounds for habeas corpus which have come to counsel's attention in the course of *preparing the appeal*." *In re Clark*, 855 P.2d 729, 751 (1993) (emphasis added). Only when the facts already "have come to counsel's attention suggesting that a basis for habeas corpus relief may exist," will the policies provide compensation. *Id*. n. 19. The investigation must then be limited to the "specific facts" that are then "known to counsel." *Id*. at 751-52.

As the *Clark* Court explained, the policies thus limit "'fishing expeditions' whose purpose is solely to discover if any basis for collateral attack on a presumptively valid judgment can be found." *Id*. n. 19. However sensible that limitation may be, the Supreme Court has thus construed its own policies as failing to provide indigent condemned inmates with counsel who is authorized or compensated even to investigate, let alone raise, potential collateral claims beyond those that are knowable by reference to the four corners of the appellate record. Even then, appointed counsel is constrained to investigate only the discrete facts and potential issues that are discernable from the record.

These limitations run afoul of § 2265(a)'s express requirement that the unitary review procedure authorize

and provide compensation for capital defendants to "raise, in the course of direct review of the judgement, *such claims as could be raised* on collateral attack." § 2265(a) (emphasis added). The limitations also create an objectively deficient standard for the performance of counsel appointed to seek collateral relief in satisfaction of Chapter 154's quid pro quo arrangement.[27] As the Ninth Circuit has noted, the meaningful assistance of counsel in collateral proceedings is important precisely because it is necessary to enable prisoners to "assert *all* possible violations of his constitutional rights" and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation. *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir.1991) (emphasis added), cert. denied, 503 U.S. 1011, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992).

The Court's conclusion draws additional support from *Morales v. Calderon*, 85 F.3d 1387 (1996), a Ninth Circuit decision filed after the close of briefing in this case. As the Ninth Circuit emphasized, the June 6, 1989 Policies just discussed are "difficult to articulate," have been "applied only randomly," and were, at least until *In re Clark*, neither clear, nor well-established. *Morales*, 96 C.D.O.S. at 3956-57. While the issue before the Ninth Circuit concerned the timeliness of a petition filed under the Policies, the Court also referred specifically to the duties in question here, which are set forth in Timeliness Standard 1-1. *Id*. at 1390.

The well-established need in this area of the law for rules that are clear and fair also provides some support

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27. Although Congress intended to give states wide latitude in developing such standards, the final decision as to the adequacy of these standards rests squarely with the federal judiciary. *See supra* note 8.

for plaintiffs' argument that California's mechanism is inadequate because the comprehensive scheme is not created by a single rule or statute. As plaintiffs note, § 2265(a) expressly requires the state to establish the appropriate mechanism by "rule of its court of last resort" or by "statute"; "The rule of court or statute must provide standards of competency." Each of these references is in the singular, as are the analogous references in U 2261(b). Defendants, by contrast, argue that "nothing in the language of the 1996 Act supports plaintiff's suggestion that Congress expected or much cared whether the several tasks ... are accomplished by a single passage of printed words or a multitude of such passages." Defs.' 2d Opp'n at 8. The Court notes that the Act's language, if narrowly construed, belies this claim. Defendants' interpretation would essentially require the Court to rewrite the relevant passage ("if the State establishes, *by rule of its court of last resort or by statute* [,] a mechanism....") to eliminate the underlined clause between "establishes" and "mechanism." Nonetheless, the Court is hesitant to embrace plaintiffs' hypertechnical interpretation of the Act, particularly given the existence of other, independent grounds for its holding.

The Court does conclude, however, that even if Congress did not intend that the mechanism must be enacted by a single statute or rule, it undoubtedly did intend to require that the state affirmatively create a system, not come forth with a post hoc rationalization. *See, e.g.*, 1991 Analysis, 137 Cong.Rec. at S3220 ("*At a minimum*, the immediate benefits to defendants would include the requirement that states ... *focus on an[d] articulate* standards of competence ...") (emphasis added). As discussed in the next section, it is readily apparent that California failed to do so. Indeed, the state's competency guidelines, which defendants claim adequately take into account the need for specialized habeas

expertise, were articulated and recommended in 1985. It was not until 1989, however, that capital counsel were required to investigate possible habeas claims. *In re Clark*, 855 P.2d at 751 ("The [June 6, 1989] Policies did, *for the first time*, impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus.") (emphasis added). Thus, it is clear that the 1985 guidelines did not "focus on and articulate standards of competence" for counsel to raise collateral claims.

D. Does California Have a Rule of Court or Statute that Provides Standards of Competency for Appointment of Counsel in Unitary Proceedings?

Section 2265(a) provides that "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." Defendants argue that California satisfies this requirement by virtue of the interaction between U 20 of the Standards of Judicial Administration Recommended by the Judicial Council, and Rules of Court 39.5 and 76.5. Section 20, entitled "Guidelines for Appointment of Counsel in Criminal Appeals," provides that each "appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5 *should* follow the guidelines in this section ..." § 20(a) (emphasis added). Section 20(c) provides:

> The Supreme Court *should* maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program

> concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellants' opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

(emphasis added). These are the only standards of competence identified by defendants.

Section 20 fails to satisfy § 2265(a)'s requirements for three independent reasons: it (1) is not a rule of court or statute; (2) does not impose any binding or mandatory standards; and (3) does not require counsel to have any experience or competence in bringing habeas petitions.

First, section 20, together with the Introductory Statement to the Judicial Council's "rules, standards, and orders," make clear that section 20 is not a rule of court. The Introductory Statement points out that "[t]he Judicial Council is established under article VI, section 6, of the Constitution, and is given various powers and responsibilities to improve the administration of justice." 1996 Cal.Rules of Court at 1 (West 1996). Under its power to "*adopt rules* for court administration," the Judicial Council has adopted certain Rules of Court, which "have the force of law." *Id.* (emphasis added). In addition, and by contrast, under its power to "*make recommendations* to the courts," the Judicial Council has adopted certain nonmandatory standards, id. (emphasis added), such as section 20. The nonmandatory nature of such standards is repeatedly emphasized in the Introductory Statement, and in section 20 itself:

> The nonmandatory nature of the standards is indicated by the use of 'should' instead of the mandatory 'shall'. Standards make

> recommendations on practice and procedure, express goals that courts and judges are urged to try to attain, and state guidelines for discretionary action. Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them ...

Id. at 1; *see also, e.g.*, section 20(a) ("Each appellate court ... should follow...."); section 20(b) ("Each Court of Appeal should maintain ..."); section 20(c) ("The Supreme Court should maintain ...").

Second, and relatedly, section 20 does not impose any binding or mandatory standards on the California Supreme Court. Nor have defendants provided any indication that the Supreme Court has followed § 20(c)'s recommendation and adopted these standards as binding upon itself. Defendants attempt to brush aside this objection by asserting that the Act does not require that the standards be "inexorably mandatory."[28] Defs.' 2d

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28. Alternatively, defendants argue that Rules of Court 39.5 and 76.5 somehow render the guidelines mandatory. They do not. Rule 76.5, which governs appointment of counsel in criminal cases, provides in relevant part that "Each Court of Appeal shall maintain at least two lists [of qualified attorneys]. In establishing the lists, the court shall consider the guidelines insection 20 ..." Rule 76.5(b).

Three points bear mentioning. First, Rule 76.5 only requires the court to *consider* the § 20 guidelines. It does not render the guidelines binding or mandatory. Second, Rule 76.5, by its terms, applies only to criminal appeals, not to habeas proceedings. Habeas corpus petitions are considered to be "*original* proceedings seeking release or modification of custody," not appeals from lower courts. Rule of Court 56.5; *In re Carpenter*, 9 Cal.4th 634, 645, (1995) (noting that California Constitution "grants original subject matter jurisdiction over habeas corpus proceedings to the superior court, the Court of Appeal, and [the Supreme Court]"). Third, Rule 76.5's reference to "Each Court of Appeal" almost certainly does not refer

Opp'n at 10. However, the language of the Act and the legislative history discussed above demonstrate that Congress deemed the provision of competent counsel at all stages of proceedings as essential to the quid pro quo tradeoff envisioned under chapter 154. Congress' express and repeated mandate that any qualifying mechanism must provide standards for the appointment of counsel would be meaningless if the decision whether to apply those standards was left to the complete discretion of the court or the guideline administrator.

Defendants do acknowledge that "if and when the supreme court ever finds it necessary to revise its procedures to allow that capital appointments be made on a *standardless* basis, then our review mechanism would no longer comply with the letter or spirit of § 2265." Defs.' May 14, 1996 Supp. Brief at 2 (emphasis in original). The Court agrees, but it also believes that defendants' concession fails to recognize the importance that Congress placed on having mandatory standards. Absent such standards, federal courts would be unable to evaluate the

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to the state Supreme Court. The only citable decision discussing this section failed to interpret the phrase so broadly. *People v. Hackett*, 43 Cal.Rptr.2d 219, 228 (Cal.App.1st Dist.1995); *but see* Rule of Court 61(d) (noting that for the purposes of rules 61 to 69, "Court of Appeal" shall also mean "Supreme Court.")

Next defendants contend that Rule 39.5 resolves "any conceivable ambiguity" about Rule 76.5's application to the Supreme Court's alleged unitary review procedure. Rule 39.5 provides that "[t]he rules *governing appeals* from the superior court in other criminal cases apply to *appeals* from judgments rendering the penalty of death ..." (emphasis added). Rule 39.5 does not render Rule 76.5, let alone s 20, binding on the Supreme Court, for two reasons. First, the rules governing appeals, which appear in Chapter I of the Rules, do not include Rule 76.5, which appears in Chapter IV, governing administrative provisions. Second, Rule 39.5 applies only to criminal appeals; it makes no mention of original habeas proceedings, which are governed by Chapter II's Rule 56.5.

adequacy of a state's mechanism without examining the competency of individual counsel. Such an approach, however, would create the very type of judicial intrusiveness that Congress sought to avoid. *See* Powell Report at 3242 ("The final judgments as to the *adequacy* of any system for the appointment of counsel [ ], however, rests ultimately with the federal judiciary.... [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation." (emphasis in original); 1991 Analysis, 137 Cong.Rec. at S3222 ("The chapter would apply to such a procedure if it included appointment of counsel *meeting* articulated standards of competence") (emphasis added); *id*. at S3220.

Third, section 20(a) contains no mention of original habeas proceedings and § 20(c) requires no minimum experience whatsoever in habeas proceedings. Defendants conclusorily assert that the standards do not need to address counsel's qualifications in habeas matters, because "appellate counsel and habeas counsel are one and the same; the competency standards are thus 'unitary' as well." Defs.' 2d Opp'n at 12. Congress almost certainly did intend that the competency standards be "unitary," but such an intention undermines rather than supports defendants' claim that the state's competency standards need not consider counsel's qualifications or experience to raise "off the record" claims. The plain language of the Act evinces Congress' concern with the ability of competent counsel to address collateral claims. *See, e.g.*, § 2265(a) (The State must establish a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel in the unitary review proceedings, including expenses relating to the litigation of *collateral* claims in the proceedings. The rule of court or statute must provide standards of *competency* for the appointment of such counsel.") (emphasis added); § 2261(b) (mechanism must provide for "competent

counsel in State *post-conviction* proceedings [and] ... The rule of court or statute must provide standards of competency for the appointment of *such* counsel.") (emphasis added); *see also* 1991 Analysis, 137 Cong.Rec. at S3220 ("At a minimum, ... these states [must] focus on an[d] articulate standards of competence for such" collateral proceedings). As noted above, however, the Judicial Council promulgated and articulated the recommended standards more than four years before the California Supreme Court established the policies that require appointed counsel to pursue collateral remedies.

Finally, the Court rejects defendants' assertion that competence in criminal appeals necessarily encompasses competence in bringing habeas petitions. As Judge Godbold, of the Eleventh Circuit, has noted, "[t]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy..... [Habeas] is the most complex area of the law I deal with." *"You Don't Have To Be a Bleeding Heart," Representing Death Row: A Dialogue Between Judge Abner J. Mikvah and Judge John C. Godbold*, Human Rights, Winter 1987, at 22, 24; *see also Lonchar v. Thomas*, 116 S.Ct. 1293, L.Ed.2d 440 (1996) (recognizing the "common practice of substitution specialized capital counsel for habeas" as an essential consideration in the development of "fair and effective" habeas reform); Report of A.B.A. Task Force on Habeas Corpus Reform reprinted in Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 Am.U.L.Rev. 1, 71 & n. 79 (1990) (listing several sources noting the singular difficulty and complexity of habeas corpus law).

Accordingly, the Court concludes that California does not comply with § 2265(a)'s requirement that "[t]he rule

of court or statute must provide standards of competency for the appointment of such counsel."

E. Does California's Mechanism Provide the Required Offer and Appointment of Counsel?

Finally, California fails to make a bona fide offer of counsel as required by § 2265(b) & 2261(c). By defendants' own admission, "Every inmate who is awaiting appointment of counsel has been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defendants' 1st Opp.Mem. at 16 (emphasis in original). The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), as incorporated by § 2265(b), that the state's procedure "must provide for ... appointment of one or more counsels to represent the prisoner *upon a finding* that the prisoner is indigent and accepted the offer ..." (emphasis added); *see also* 1991 Analysis, 137 Cong. Rec. at S3220 ("*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings ...") (emphasis added).

IV. RELIEF

A. Declaratory Judgement

"In a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a); *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir.1994). The Court has concluded that this case presents an actual controversy that is within its jurisdiction.

Accordingly, the Court has the discretionary power to issue a declaratory judgment.

Declaratory relief is favored where, as here, alternative remedies are less effective or unavailable. Contrary to defendants assertions, case-by-case adjudication of Chapter 154's applicability is not a better or more effective remedy. Case-by-case adjudication not only will involve a multiplicity of suits litigating identical legal and factual issues, but also will do nothing to alleviate the uncertainty giving rise to plaintiffs' claim. The risk that Chapter 154 applies will effectively force plaintiffs whose convictions have been affirmed to file their claims within the six month deadline, possibly resulting in unintentional waiver or inadequate presentation of meritorious claims. This unwitting error might not be remedied in time to stop an execution even if Chapter 154 were later found by a higher court to be inapplicable.

Accordingly, for the reasons discussed above, and good cause appearing, the Court hereby DECLARES that Chapter 154 of Title 28 of the United States Code does not, at the present time, apply to California, because California has failed to comply with the opt-in provisions

of 28 U.S.C. § 2261 or § 2265. The Court further declares that the provisions of Chapter 154 are not applicable to the federal habeas corpus proceedings of any members of the provisionally certified class. This declaration shall remain in effect until and unless the State of California demonstrates to this Court that it has complied with the opt-in provisions of 28 U.S.C. § 2261 or § 2265.

B. Preliminary Injunction

In the Ninth Circuit, in order to be entitled to preliminary injunctive relief, a plaintiff must show one of the following:

> [E]ither (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor.

EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir.1991). "The alternative standards are not separate tests but the outer reaches of a single continuum. Essentially the trial court must balance the equities in the exercise of its discretion." *International Jensen Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.1993). A grant or denial of a motion for a preliminary injunction lies within the discretion of the district court, and it will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion. *Chalk v. U.S. District Court*, 840 F.2d 701, 704 (9th Cir.1988).

Plaintiffs have satisfied both prongs of the test for preliminary injunctive relief. Prior to issuance of the Court's TRO, defendants' threats to invoke Chapter 154's expedited review provisions were causing plaintiffs to forego rights to which they are entitled under Chapter 153. Defendants' assertions during the course of this

litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions.

As a practical matter, defendants' assertions were securing for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that Congress required states to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats were effectively depriving plaintiffs of rights that the Court has declared they are entitled to under Chapter 153, and, arguably, under the Due Process Clause as well. Whether, as plaintiffs assert, this effective deprivation constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 appears to be a difficult question of first impression. However, at the least, plaintiff has raised serious questions in this regard. Given the balance of hardships in this case and the potential life or death consequences at stake, the Court is obligated to resolve any doubts in plaintiffs' favor and to grant a preliminary injunction.

In addition, and independent of 42 U.S.C. § 1983, the Court finds that injunctive relief is necessary and proper to effectuate the terms of its declaratory judgment. Accordingly, the Court may issue injunctive relief pursuant to 28 U.S.C. § 2202. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

For the foregoing reasons, the Court reaffirms its May 24, 1996 order converting the TRO into a preliminary injunction. Accordingly, as indicated in that order, defendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28,

United States Code, in any state or federal proceeding involving any class member.

V. STAY

Defendants have requested a temporary stay of the Court's injunctive relief and provisional class certification, "solely for the purpose of facilitating defendants' anticipated application to the Ninth Circuit for a stay pending appeal." Good cause appearing, and in deference to the important state interests previously recognized by the Court, the Court hereby STAYS the provisional class certification and preliminary injunctive relief for a period of five (5) days. The Court DENIES defendants' alternative request for this Court to issue a partial stay pending appeal.

CONCLUSION

For the reasons discussed above, and good cause appearing, it is hereby ORDERED that

(1) Plaintiff's request for provisional class certification is GRANTED;

(2) Plaintiff's request for final declaratory relief is GRANTED;

(3) Plaintiff's request for preliminary injunctive relief is GRANTED; and

(4) Defendants' request for a five (5) day partial stay of the Court's order is GRANTED.

IT IS SO ORDERED.

DATED 6/14/96 /s/THELTON E. HENDERSON
THELTON E. HENDERSON, CHIEF
JUDGE
UNITED STATES DISTRICT COURT

CONSTITUTION OF THE UNITED STATES AMENDMENT XI--SUITS AGAINST STATES

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS
CHAPTER 154--SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the

decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 154--SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction

review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2. THE JUDICIAL COUNCIL
ARTICLE 1. GENERAL PROVISIONS

§ 68511.5. Selection of appointed counsel to handle criminal appeals by indigent defendants

Not later than January 1, 1985, the Judicial Council shall adopt rules of court regulating the selection of appointed counsel, other than the State Public Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts. In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office of the State Public Defender.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 1. GENERAL PROVISIONS

§ 68070. Rules of court; authority to make; restrictions; uniformity

(a) Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council. These rules shall not:

(1) Impose any tax, charge, or penalty upon any legal proceeding, or for filing any pleading allowed by law.

(2) Give any allowance to any officer for services.

(b) The Judicial Council shall adopt rules or procedures to encourage uniformity of requirements throughout a court and statewide. The subjects on which uniformity should be sought shall include, but are not limited to, (1) the form of papers, (2) limitations on the filing of papers, (3) rules relating to law and motion, and (4) requirements concerning documents to be filed at or prior to trial.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES
RELATING TO THE SUPREME COURT AND
COURTS OF APPEAL
CHAPTER IV. ADMINISTRATIVE PROVISIONS
GOVERNING REVIEWING COURTS

Rule 76.5. Appointment of counsel in criminal appeals

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
APPENDIX TO CALIFORNIA RULES OF COURT
DIVISION I. STANDARDS OF JUDICIAL ADMINISTRATION RECOMMENDED BY THE JUDICIAL COUNCIL

§ 20. Guidelines for appointment of counsel in criminal appeals

(a) [General] Each appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5, should follow the guidelines in this section to match each appointed attorney's skills and experience with the demands of the case. Before appointment of counsel in a case, the court should determine the demands of the case by reviewing the trial court file or by other appropriate means. In determining the demands of the case, the following factors should be considered: the length of the sentence; the novelty or complexity of the issues; the length of the trial and of the reporter's transcript; and any questions relating to the competency of trial counsel.

(b) [Courts of Appeal] Each Court of Appeal should maintain three lists of qualified attorneys. The lists should be based on the following minimum qualifications:

List I (For appointment to cases in which probation was granted, or the sentence is five years or less in state prison): (1) active membership in the state bar; (2) attendance at one approved appellate training program; (3) participation in one trial or appellate brief; and (4) submission of one sample of the attorney's writing for review by the court or administrator.

List II (For appointment to cases in which the sentence is five years to fifteen years in state prison): (1) active practice of law for 18 months in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of two appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

List III (For appointment to cases in which the sentence is fifteen years to life in state prison): (1) active practice of law for three years in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of five appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

(c) [Supreme Court] The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 2. OF CRIMINAL PROCEDURE
TITLE 9. APPEALS FROM SUPERIOR COURTS
CHAPTER 1. APPEALS, WHEN ALLOWED AND HOW TAKEN, AND THE EFFECT THEREOF

§ 1241. Compensation and expenses for court-appointed counsel

In any case in which counsel other than a public defender has been appointed by the Supreme Court or by a court of appeal to represent a party to any appeal or proceeding, such counsel shall receive a reasonable sum for compensation and necessary expenses, the amount of which shall be determined by the court and paid from any funds appropriated to the Judicial Council for that purpose. Claim for the payment of such compensation and expenses shall be made on a form prescribed by the Judicial Council and presented by counsel to the clerk of the appointing court. After the court has made its order fixing the amount to be paid the clerk shall transmit a copy of the order to the State Controller who shall draw his warrant in payment thereof and transmit it to the payee.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

Policy

1. Stays of execution.
2. Withdrawal of counsel.
3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions.

Adopted by the Supreme Court Effective June 6, 1989

Policy 1. Stays of Execution

The Court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

Policy 2. Withdrawal of counsel

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and wiling to accept appointment for appropriate postappeal representation related to the case.

Policy 3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas

corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1 [220 Cal.Rptr. 382, 384, fn. 1, 708 P.2d 1260, 1262, fn. 1]), the petition was filed within a reasonable time after that date. 1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of habeas corpus petitions and other ancillary pleadings in the California Supreme Court; (iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court and, if certiorari is granted, preparation

and filing of a brief or briefs on the merits and preparation and presentation of oral argument; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for authorization to incur, and reimbursement of, investigation expenses shall be governed by the following standards:

2-2.1. Without prior authorization of the court, counsel may incur expenses up to a total of $3,000 for habeas corpus investigation, and may submit claims to the court for reimbursement up to that amount. The court will reimburse counsel for expenses up to $3,000 that were reasonably incurred.

2-2.2. If after incurring $3,000 in expenses, counsel determines it is necessary to incur additional expenses for which he or she plans to seek reimbursement from the court, counsel must seek and obtain prior authorization from the court. As a general rule, the court will **not** reimburse counsel for expenses exceeding $3,000,

without prior authorization of the court. Requests by appointed counsel for prior authorization to incur investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, counsel shall file with this court a "Confidential request for authorization to incur expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for authorization to incur expenses shall set out:

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. (a) An itemized listing of all expenses previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

2-5. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

2-6. When a petition is pending in this court to exhaust claims presented in a federal habeas corpus petition, a request by counsel for investigative funds to bolster or augment claims already presented in the petition normally will be denied absent a showing of strong justification for the request. A request for investigative funds may be granted if the petitioner demonstrates that he or she has timely discovered new and potentially meritorious areas of investigation not previously addressed in the petitioner's federal or state petitions. This has been the internal operating policy of the court since December 16, 1992.

2-7. Each request for fees relating to a habeas corpus petition must be accompanied by: (a) An itemized listing of all fees previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS IN THE CALIFORNIA SUPREME COURT

Revised by the Supreme Court of California
December 22, 1993

Previously Revised September 19, 1990
Amended Effective January 1, 1997

Guideline

I. Introduction
II. Reasonable Compnsation.
III. Necessray Expenses.
IV. Fee and Expense Disallowances.

I. Introduction

The California Supreme Court determines the compensation of appointed counsel representing indigent criminal appellants. The guidelines set forth below are a general statement of the factors considered by the court in determining appropriate compensation for the time devoted to indigent criminal appeals (and related habeas corpus representation) and the reasonable and necessary expenses incurred by appointed counsel. In reviewing these guidelines, counsel should bear in mind the following:

A. Although most of the guidelines apply routinely, the application of others, such as the reimbursement of travel expenses or of the cost of expert witnesses and investigators, depends on the circumstances of each case.

B. The rates in the guidelines are subject to periodic change. These include the hourly compensation of appointed counsel, mileage and per diem rates for travel, and rates for the reimbursement of the cost of services by others.

C. For the most current information concerning these matters, and the payment guidelines generally, counsel are encouraged to contact the California Appellate Project (CAP). CAP is the appointed counsel administrator that assists private counsel with automatic appeals. CAP's address and telephone number are as follows:

California Appellate Project
One Ecker Place, Suite 400
San Francisco, CA 94105
(415) 495-0500

II. Reasonable Compensation

A. Compensation Rate. The compensation rate for members of the State Bar of California who are appointed as counsel in indigent criminal appeals is the same allowable-hour rate appointed counsel received or was eligible to receive in the Court of Appeal, except for automatic appeals, for which the rate is $98 per allowable hour.

B. "Allowable Hours". The compensation rate is multiplied by the number of "allowable hours" of appellate work to determine a reasonable sum for compensation. Benchmarks for "allowable hours" in capital cases (i.e., an estimate of the time an attorney experienced in the handling of criminal appeals might devote to the various stages of capital litigation) are set out below, in part II.*J*.3.

C. Recording of Hours. Appointed counsel should record the number of hours devoted to the following phases of appellate work:

1. Record review.
2. Record correction.
3. Motions and applications.
4. Sixty-day status reports.
5. Researching and writing opening brief.
6. Researching and writing reply brief.
7. Researching and writing supplemental brief(s).
8. Investigating and writing habeas corpus petition.
9. Reply to response(s) to habeas corpus petition.
10. Evidentiary hearing.
11. Oral argument (includes preparation).
12. Post-oral argument representation.
13. Rehearing petition or opposition.
14. Certiorari petition or opposition.
15. Client communication.
16. Travel.
17. Other services (specify).

D. Factors Considered by the Court. The following factors are considered by the court in determining the number of allowable hours:

1. Whether the billed hours are within the benchmarks, or whether there exists good cause to depart from the benchmarks.
2. Length of the record.
3. Complexity and novelty of the legal issues.
4. Quality of work.

E. Exceptional Procedural Matters. Counsel should provide the court with an explanation of the time spent on exceptional procedural matters, such as repeated applications for augmentation of the record on appeal.

F. Travel Time. Travel time will be compensated to the extent that the time could not reasonably be spent working on the case.

G. Circumstances Warranting Additional Compensation. If counsel believes there exist extraordinary circumstances that justify compensation beyond that set out in these guidelines, counsel should bring such factors to the attention of the court at the time a claim for payment of compensation and expenses is presented. Counsel's showing of justification should be commensurate with the extent to which he or she seeks to exceed the benchmarks.

H. Submission of Payment Requests. Counsel may submit a request for payment of compensation and expenses every 90 days.

I. Special Rules for Capital Cases. The following rules apply to capital cases only:

1. *Delay in Certification of Record or Filing of Brief.* If delay in the certification of the record on appeal or in the filing of the appellant's opening brief (AOB) is due to a lack of diligence on the part of appointed counsel, payment of compensation will be deferred until the record is certified or the AOB is filed.

2. *Forms and Reports.* Counsel must submit a cumulative hours compensation form and the most recent status report with every request for payment. The cumulative hours compensation form will be provided by the court or may be obtained from CAP. Counsel should retain a copy of each cumulative hours compensation form submitted. These forms will facilitate completion of the data form for automatic appeals, which must accompany the request for final payment for services rendered in this

court. Note that although a request for payment may be submitted every 90 days, a current status report must be submitted every 60 days.

3. *"Allowable hours" Benchmarks.* The court, in consultation with CAP, has established the following benchmarks for the various stages of capital representation:

Appeal.

Record Review: 50 pp./hr.

Record Correction: 20-80 hrs.

Client Communication: 15-30 hrs.

Appellant's Opening brief (AOB): 260-600 hrs.

Appellant's reply brief (ARB): 55-160 hrs.

Oral argument: 40-80 hrs.

Supplemental briefs: 20-80 hrs.

Rehearing petition: 25-75 hrs.

Certiorari petition: 40-75 hrs.

Briefing and argument in the United States Supreme Court after grant of certiorari: Counsel shall seek compensation for such services from the United States Supreme Court. Should that court deny compensation for such services, this court will authorize reasonable compensation for such services up to a maximum of $5,000.

Habeas Corpus Briefing.

Investigate and present habeas petition: 140-330 hrs.

Traverse/informal reply: 50-120 hrs.

Habeas Corpus Evidentiary Hearing.

Preparation: 150-300 hrs.

Evidentiary hearing: 72-144 hrs. (i.e., 3-6 days)

Post-hearing litigation before the referee: 75-125 hrs.

Post-Hearing Briefs In The Supreme Court.

Brief on the merits, Response brief, and Supplemental brief: 50-150 hrs.

These benchmarks are guidelines for the expected hours in "typical" cases, and are neither ceilings nor floors for fees in any given case. The court will continue to monitor its fee payment data to determine whether adjustment of the benchmarks is warranted in the future.

Counsel is advised to review the benchmarks carefully, and to bear the following in mind throughout the course of representation (i.e., at each "stage" of the litigation):

a. The "lower range" of the benchmarks A case that has a relatively short record (i.e., 3,000-6,000 pages), and that raises standard (albeit fact-specific) issues already resolved in prior cases, should generally produce hours near

or below the "lower range" of the benchmarks. Based on experience, the court expects a substantial percentage of cases to be completed under the lower range of the benchmarks.

Counsel should determine at an early stage of representation whether the case meets the description of a "lower range" case. If counsel has such a case, and submits a fee request substantially exceeding the lower range of the benchmarks for any particular stage of the litigation, he or she must include in each request a detailed explanation of why fees exceeding the lower range of the benchmarks should be awarded. The court will award fees substantially exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

b. The "upper range" of the benchmarks Based on experience, the court anticipates a number of cases will produce fee hours at or near the upper range of the benchmarks, and occasionally, over that range. The following important caveats apply in such cases:

The upper range of the benchmarks is generally reserved for those cases with relatively long records (i.e., 10,000 or more pages), *and* that raise novel or difficult issues. The mere fact that the record may be long does *not* indicate that "upper range" or "over-benchmark" hours will be appropriate in any or each stage of the litigation.

If a case does not meet the above description of an "upper range" or "over-benchmark" case, counsel should not expect to receive "upper range" or "over-benchmark" fees. In order to secure such fees in a case not otherwise meeting the above description, counsel must include in the request a detailed explanation of why the fees requested should be awarded. The court will award fees near or exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

4. *Second Counsel "Override".* In cases in which appointed counsel deems it necessary to associate with second counsel, and the court approves the association, the court may in its discretion, and on a showing of good cause, approve compensation to appointed counsel for hours incurred exceeding the "appeal" through "habeas briefing" benchmarks by 5-15 percent. As a general rule the court will allow the full 15 percent override in cases in which counsel divides the hours fairly evenly for the stage for which fees are sought. If counsel divides the work less evenly, the override will be diminished accordingly. The court will continue to monitor the cases to determine whether the 15 percent ceiling should be increased.

III. Necessary Expenses

A. Items not Qualifying as Expenses. The hourly fee should cover all overhead related to a case, including secretarial services, word processing, and the like. Expenses listed below will be reimbursed to the extent they are itemized, reasonable, and necessarily incurred during the course of the appeal, and otherwise comply with the court's procedures (see below, part III.B). Note that these guidelines apply not only to appointed counsel,

but to those persons, including experts and investigators, who assist appointed counsel with the appeal.

B. Prior Approval. Prior approval is required for extraordinary expenses, such as for out-of-state travel, expert witnesses and investigators. In capital cases, expense requests are governed by the court's "Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions," published in the Official Reports advance sheets, pamphlet No. 7 (Mar. 13, 1997), rules pages 1-5. (See id., std. 2-1 et seq.)

C. Reimbursable Expenses. In general, when making a request for reimbursement, counsel must itemize all expenses, and must provide in the request the original receipts for the following: (i) travel expenses (airfare, car rental, hotel bills, etc.) over $47 per day; (ii) telephone and copying expenses over $50 and $100 per month, respectively (see below); and (iii) all other single transactions that exceed $100. Counsel should keep all receipts in the event documentation is later required.

1. *Photocopying.* The cost of photocopying will be reimbursed, at not more than 10 cents per page, whether the copying is done inside or outside counsel's office. If counsel represents that photocopying was billed at 10 cents per page or less, receipts will not be required unless the expenses are in excess of $100 per month.

2. *Postage and Delivery Costs.* Expenses for express mail/messenger service will be reimbursed only on a showing that use of express mail/messenger service was necessary and reasonable.

3. *Telephone Charges.* Receipts will not be required unless the expenses are in excess of $50 per month.

4. *Travel Expenses.*

a. The court will determine the reasonableness and necessity of travel expenses on a case-by-case basis. Counsel are cautioned that travel expenses are not considered necessary when the purpose of a trip may reasonably be accomplished in another way, such as by telephone or correspondence. Further, counsel should use the least expensive alternative means of travel. For motor vehicles, the current mileage rate is 27.5 cents per mile.

b. When travel is required by appointed counsel or a person authorized to assist appointed counsel, reasonable and necessary meals and lodging may be claimed, to the extent allowed under State Board of Control rules. Counsel should contact CAP for further information.

c. Some of the lesser known provisions of the Board of Control rules are as follows:

(1) The per diem allowance does not apply for trips of 25 miles or less.

(2) Lunch is not covered unless the travel period is 24 hours or more.

(3) The cost of collision coverage in a contract for a rental car is not covered.

5. *Computerized Legal Research.* The reasonable cost of computerized legal research (as opposed to the costs of installation and monthly access fees), when the use is specifically attributable to the case, will be reimbursed to the extent reasonably and necessarily incurred. Counsel must explain in writing the specific nature of the computer expenses (e.g., Shepard's, Autocite, issue searches, etc.),

and must explain why computerized research was more efficient than the same research performed "manually."

6. *Services of Law Clerks, Paralegals, and State Bar Members.*

a. Counsel shall be reimbursed for the compensation of the following individuals at the following rates:

(1) Law clerks who are not members of the State Bar of California at $25 per allowable hour.

(2) Paralegals at $25 per allowable hour.

(3) Members of the State Bar of California at the rate at which appointed counsel is paid (currently $98 per allowable hour for capital cases).

b. Reimbursement of the compensation for all persons performing legal services, other than appointed counsel, shall be subject to the following conditions:

(1) In submitting a claim for reimbursement, counsel shall describe with specificity the legal services and number of hours of work performed by each other person so the court can evaluate the reasonableness of the services and expenses as part of appointed counsel's overall claim. It is expected that the hours devoted to legal services by associate counsel, and any "exceptionally high" hours attributed to law clerks and paralegals (i.e., hours exceeding 30 percent of the benchmark hours for appointed counsel for any given stage), will reduce the

hours that appointed counsel will devote to those services.

(2) Appointed counsel shall not delegate to others those functions that require the ability and experience for which counsel was appointed.

(3) Appointed counsel shall supervise and have full responsibility for the services performed by others.

7. *Services of Investigators and Experts.*

a. An investigator or expert shall be compensated at a rate not to exceed the maximum rates listed below. Counsel must establish that use of an expert's services is reasonably necessary under the facts of the case. Counsel seeking to use the services of multiple experts relating to a single or common issue must demonstrate a compelling necessity for such use of multiple experts. In addition, counsel must include in the request a representation that the rate requested

(1) does not exceed the investigator's or expert's customary rates for the services performed, and

(2) is consistent with local prevailing rates for the services performed.

b. The maximum rates are as follows:

(1) Investigators, $40 per hour.

(2) Penalty phase consultants, $50 per hour.

(3) Psychiatrists and other mental health experts, $125 per hour.

(4) Other forensic experts, $125 per hour.

(5) Attorneys serving as experts, $100 per hour. (Note: Until an order to show cause is issued, or the People submit an expert declaration in their informal opposition to a habeas corpus petition, the court will not approve payment for attorney "expert opinion" in the form of declarations, etc.)

(6) Any expert listed above testifying at a court proceeding, $600 per day or $350 per half day.

c. In exceptional circumstances, when the need for services at a greater rate of compensation is documented and prior authorization is obtained from the Supreme Court, compensation beyond the maximum may bc paid.

IV. Fee And Expense Disallowances

The court will provide reasons in writing for fee disallowances of $1,000 or more, and expense disallowances of $500 or more.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
GUIDELINES FOR FIXED FEE APPOINTMENTS, ON OPTIONAL BASIS, TO AUTOMATIC APPEALS AND RELATED HABEAS CORPUS PROCEEDINGS IN THE CALIFORNIA SUPREME COURT

[Introduction]
1. Fixed Fee Categories
2. Incidental and Investigative Expenses
3. Requests for Additional Fees
4. Case Evaluation
5. Progress Payments
6. Conversion from Times and Costs Appointment to Fixed Fee
7. Second Counsel
8. Valuation and Length of Record on Appeal
9. Applicability of Supreme Court Policies Regarding Cases Arising From Judgments of Death

(Adopted by the Supreme Court December 14, 1993, effective January 1, 1994)

[Introduction][1]

Presently, appointed counsel in automatic appeals are compensated on a "time and costs" basis, under the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court (as revised [Off. Reps. Adv. Pamp. No. 20 (1996) Rules pp. 6-15; West's Cal. Rules of Court (State ed. 1997) pp. 1037-1041][2]) (hereafter Payment Guidelines).

1. Caption editorially supplied.

2. Edition, year, and page references updated by Publisher at request of Reporter of Decisions.

Under the Payment Guidelines, appointed counsel must submit a detailed and lengthy cumulative hours compensation form with every request for payment of fees and reimbursement of expenses. Moreover, "allowable hours" benchmarks limit the fees available for each stage of the capital representation; other provisions limit or exclude reimbursement for expenses. Requests for prior approval of extraordinary expenses are governed by the Supreme Court Policies Regarding Cases Arising From Judgments of Death (as revised [Off. Reps. Adv. Pamp. No. 20 (1996) Rules pp. 1-5; West's Cal. Rules of Court (State ed. 1997) pp. 1033-1035][3]).

In an effort to provide appointed counsel in capital cases greater predictability, consistency and control over compensation and expenses, and to reduce administrative burdens on both counsel and the Court, the Court has adopted an optional fixed fee and expenses payment system.

The following categories of fixed fees comprise appointed counsel's compensation for all hourly services and expenses: (1) on the direct appeal, through the filing of a certiorari petition to the United States Supreme Court, or an answer thereto (but not including any briefs or appearances in the United States Supreme Court after grant of certiorari or any briefs or appearances on remand to the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines), (2) on the state habeas corpus investigation, through the filed habeas corpus petition and

request of Reporter of Decisions.

3. Edition, year, and page references updated by Publisher at request of Reporter of Decisions.
(adopted, eff. Jan. 1, 1994. As amended, eff. Sept. 1, 1995)

informal reply (but not including any traverse, habeas corpus evidentiary hearing or post-hearing briefs in the California Supreme Court, which work would be compensated under the Payment Guidelines), (3) any trial court proceedings under Penal Code sections 1193 and 1227 to set an execution date, and (4) any clemency petition to the Governor. (See Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Compensation Stds., std. 2-1.)
(Adopted, eff. Jan 1, 1994. As amended, eff. Sept. 1, 1995.)

1. Fixed Fee Categories

Category I: $85,000.

A. An appeal from a judgment based on a guilty plea and penalty phase; or

B. An appeal from a judgment on remand following a reversal limited to penalty.

C. Caveat: An appeal from a judgment on limited remand for a new hearing on the automatic motion to modify the death verdict (Pen.Code, sec. 190.4, subd. (e)) will likely be valued well below $85,000. (See also, Guideline 4 [Case Evaluation], *infra*.)

Category II: $130,000.

A. An appeal from a judgment on remand following a reversal limited to the special circumstance finding(s) and penalty; or

B. An appeal otherwise in category I(A) or I(B) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 4,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants; or

C. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is under 6,000 pages.

Category III: $165,000.

A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is between 6,000 and 12,000 pages; or

B. An appeal otherwise in category II(A) or II(C) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 5,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category IV: $195,000.

A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is 12,000 or more pages; or

B. An appeal otherwise in category III(A) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 10,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category V: $225,000 base fee.

Exceptional cases that occur infrequently, involve many victims and incidents, and have a combined record on appeal of 25,000 or more pages. In this category,

appointed counsel may present a justification at the outset for a fixed fee higher than the base fee.
(Adopted, eff. Jan 1, 1994. As amended, eff. Sept. 1, 1995.)

2. Incidental and Investigative Expenses

All incidental expenses for the direct appeal are included in the fixed fee. In addition to the agreed-upon fixed fee, counsel may also incur up to $12,000 in habeas corpus investigative expenses, without prior Court authorization, subject to the Court's Payment Guidelines, supra, part III, subpart C, paragraphs 1-7, inclusive ("Reimbursable expenses"). Counsel will be reimbursed for all such habeas corpus investigative expenses that were reasonably incurred, up to $12,000. The Court will not authorize or reimburse habeas corpus investigative expenses over $12,000, prior to the issuance of an order to show cause. (See also, Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Timeliness Stds., std. 1-1 [as amended July 29, 1993].)
(Adopted, eff. Jan. 1, 1994. As amended, eff. Sept. 1, 1995.)

3. Requests for Additional Fees

In extraordinary and unique situations, the Court will entertain requests for additional fees based on exceptional circumstances (e.g., circumstances that were unforeseeable at the time of the appointment of counsel on a fixed fee basis). In such situations, counsel shall have the burden of proof to justify any additional fees.
(Adopted, eff. Jan. 1, 1994.)

4. Case Evaluation

There will be agreement on the fixed fee prior to the appointment of counsel. (See also, Guideline 6 [Conversion From Time and Costs Appointment to Fixed Fee], *infra*.) Initially, applicant counsel selected to

consider an appointment to a specific automatic appeal will have the option of investigating that case for purposes of proposing a fixed fee pursuant to these alternative guidelines, rather than the traditional time and costs method. At any given time, there will be only one set of applicant counsel investigating a specific automatic appeal for purposes of a possible appointment. Applicant counsel are encouraged to consult with trial counsel, examine any available transcript "dailies" prepared during the trial or other proceedings, and examine any available materials normally found in the clerk's transcript. Counsel are also encouraged to examine additional materials and information that may be available from the California Appellate Project in San Francisco. Using these alternative guidelines, applicant counsel opting to be appointed on a fixed fee basis will propose a category and hence a fee for all services and expenses in the case. The Court's concurrence is required for any such appointment.

Discussions with applicant counsel regarding proposals for fixed fee appointments shall be conducted through the Automatic Appeals Monitor.

The fixed fee encompasses counsel's investigative costs in reviewing the case for purposes of considering an appointment. If counsel's proposal for a fixed fee is not accepted by the Court, counsel will not be reimbursed for those investigative costs; however, counsel may request an appointment to that case pursuant to the traditional time and costs method of the Payment Guidelines.
(Adopted, eff. Jan. 1, 1994.)

5. Progress Payments

Until appointed counsel files the appellant's opening brief, a current status report must be filed every 60 days; thereafter, status reports regarding habeas corpus investigation are required every 60 days until a petition is

filed. Other than reimbursement for habeas corpus investigative expenses, documentation and itemization of hours and expenses by appointed counsel are not required under these alternative guidelines. Instead, counsel will be paid one-sixth of the fixed amount shortly after the actual appointment. Thereafter, counsel will receive progress payments after specified stages of the appellate representation: one-sixth after counsel's first request for correction of the record, one-sixth after certification of the record, one- sixth after counsel files the appellant's opening brief, one-sixth after counsel files a reply brief, and one-sixth after oral argument and submission of the matter on the direct appeal. Under limited circumstances (e.g., a delay in the certification of the record not due to a lack of diligence on the part of appointed counsel), the Court will authorize partial payments before completion of the relevant stage(s) of representation. However, the Court cautions all counsel that the order of appointment continues until the conclusion of: (1) counsel's duties and representation on the direct appeal, (2) counsel's responsibilities regarding state habeas corpus proceedings, including any state habeas corpus proceedings following a remand from federal court for purposes of exhaustion of state remedies, (3) any trial court proceedings under Penal Code sections 1193 and 1227 to set an execution date, and (4) any clemency petition to the Governor. (See Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Policy 2 [Withdrawal of Counsel], and Compensation Stds., std. 2-1.)
(Adopted, eff. Jan. 1, 1994.)

6. Conversion From Time and Costs Appointment to Fixed Fee

Counsel appointed to an automatic appeal under the traditional time and costs basis of the Payment Guidelines are encouraged to consider converting their method of compensation pursuant to this optional, fixed fee payment

system. Any such conversion must take into account any payments previously made to counsel, and must be approved by the Court. Ordinarily, conversion will not be approved after the filing of the appellant's opening brief. Counsel approved by the Court for an appointment to his/her first automatic appeal should carefully consider an initial appointment under the time and costs basis of the Payment Guidelines. A conversion to a fixed fee appointment pursuant to these alternative guidelines may be more appropriate after such counsel has become familiar with the case.
(Adopted, eff. Jan. 1, 1994.)

7. Second Counsel

The Court encourages association with second counsel. Unlike the procedure under the traditional time and costs appointment scheme of the Payment Guidelines, the fixed fees provided by this optional payment system are intended to adequately compensate appointed counsel and any associate counsel. Hence, the Court will not recognize a "second counsel override" in fixed fee cases.
(Adopted, eff. Jan. 1, 1994.)

8. Valuation and Length of Record on Appeal

In determining the length of the combined record on appeal as part of the process whereby a case may be valued within a fixed fee category, the Court will take into consideration whether an unusual proportion of the record is comprised of jury voir dire and/or preliminary hearing transcript. When appropriate, the Court may treat the combined record as having a reduced length.
(Adopted, eff. Jan. 1, 1994.)

9. Applicability of Supreme Court Policies Regarding Cases Arising From Judgments of Death

The Supreme Court Policies Regarding Cases Arising From Judgments of Death, as amended, apply to all

automatic appeals in which counsel has opted for a fixed fee pursuant to these alternative guidelines. However, the third sentence of standard 2-2 of the Compensation Standards, through standard 2-4.4 of the Compensation Standards (governing authorization to incur, and reimbursement of, habeas corpus investigation expenses), shall not apply to fixed fee cases.
(Adopted, eff. Jan. 1, 1994.)

Supreme Court, U.S.
FILED
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CLERK

No. 97-391

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners,*

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, TROY A. ASHMUS, requests leave to proceed in this matter and file a brief in opposition to the petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed before the U.S. District Court. Respondent's affidavit in support of this motion is attached hereto.

DATED: November 4, 1997

Respectfully submitted,

Michael Laurence

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Attorney for Respondent

No. 97-391

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v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, TROY A. ASHMUS, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses that I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No __X__

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

May, 1984 (Salary: approx $4.50 per hour for 30 hours/wk.)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes _____ No __X__

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account (include any funds in prison accounts)?

Yes __X__ No _____

a. If the answer is yes, state the total value of the items owned.

$.39 in inmate trust account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No __X__

If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

TROY A. ASHMUS

SUBSCRIBED AND SWORN TO before me this 18th day of September, 1997.

NOTARY PUBLIC

DENISE NUGENT BULL
Comm. # 1069049
NOTARY PUBLIC - CALIFORNIA
Marin County
My Comm. Expires Aug. 16, 1999

CERTIFICATE

I hereby certify that the respondent, TROY A. ASHMUS, has the sum of $ .39 on account to his credit at San Quentin State Prison, where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution:

None

Dated: 9-18-97

Authorized Officer of the
San Quentin State Prison,

No. 97-391

IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the Eleventh Amendment does not bar an action to determine whether the State of California was entitled to the benefits of Chapter 154 where State officials' threats to invoke Chapter 154 deprived habeas petitioners of "their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q)," *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997), and where the State concedes that such a determination could be made in an individual habeas proceeding without offending the Eleventh Amendment?

2. Did the Court of Appeals correctly conclude that State of California may not insist that federal courts limit and expedite consideration of federal constitutional claims in capital cases in accordance with Chapter 154 of Title 28 because it has failed to provide "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel," a conclusion endorsed by the California Legislature's recent enactment of legislation intended to comply with the prerequisites of Chapter 154 and supported by petitioners' repeated concessions during proceedings in the District Court?

3. In effectuating its declaratory judgment, did the District Court properly invoke its inherent authority to enjoin State officials from asserting that the State of California has qualified under the provisions of Chapter 154 and require the parties to this action to litigate the application of Chapter 154 in one forum?

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No. 97-391

IN THE

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October Term, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners,*

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Troy A. Ashmus ("respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by petitioners Arthur Calderon, Teena Farmon, James H. Gomez,[1] and Daniel E. Lungren ("petitioners"). Petitioners have presented no compelling reasons why this Court should review the decision of the United States Court of Appeals for the Ninth Circuit in *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997). *See* Sup. Ct. R. 10.

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[1] Since the filing of the Petition, petitioners have informed the Court and respondent that C.A. Terhune has replaced James Gomez as Director of the California Department of Corrections.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Subsequent to the filing of the Petition, the California Legislature enacted and the Governor of California signed Senate Bill 513 seeking to qualify the State under the optional death penalty provisions contained in Chapter 154 of Title 28. 1997 California S.B. 513 (enacted October 12, 1997). The legislation amends sections 15402 and 15421 of, and adds Chapter 2.1 (commencing with section 68650) to, Title 8 of the California Government Code. The text of Senate Bill 513 is included in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

On April 24, 1996, the procedures for adjudicating federal habeas petitions were substantially altered with the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996). In addition to amending the provisions in Chapter 153 of Title 28, the AEDPA created a new Chapter 154 of the Judiciary Code, codified at 28 U.S.C. sections 2261-2266. Chapter 154 provides for expedited consideration of capital cases in States that provide competent counsel and the resources necessary to develop and present claims in state habeas proceedings. Under the provisions of Chapter 154, a State may "opt-in" to the statutory scheme by establishing a mechanism for the appointment and compensation of counsel in state postconviction or "unitary" proceedings, 28 U.S.C. sections 2261, 2265. If a State complies with these requirements, federal habeas petitions brought by death row inmates are reviewed pursuant to the provisions of Chapter 154 rather than the procedures contained in Chapter 153 of Title 28. The benefits to the State in Chapter 154 include the following provisions:

1. The statute of limitations for filing a first federal petition is 180 days. 28 U.S.C. § 2263(a). Any petition not filed within the limitations period is treated as a second or successive petition, and is therefore subject to the stringent "gatekeeping" provisions for such petitions contained in 28 U.S.C. section 2244(b). 28 U.S.C. § 2262(c).

2. Federal court review of claims for relief is constrained by 28 U.S.C. section 2264, which limits cognizable claims to those that have been "decided on the merits" by the state courts, unless the petitioner meets certain exceptions. 28 U.S.C. § 2264(a).

3. Once the state has filed an answer to the petition, any amendment to the petition filed thereafter is treated as a successor petition. 28 U.S.C. § 2266(b)(3)(B).

4. The process of decision is expedited. The district court has 180 days after the filing of the petition to issue a final decision; of that 180 days, the parties have 120 days to complete all proceedings in the case, including an evidentiary hearing. The court of appeals is required to issue its decision

> within 120 days after the filing of the reply brief. If a court does not meet these deadlines, the state can seek enforcement of the time periods by filing a writ of mandamus in the next highest court. 28 U.S.C. § 2266.

As both the Court of Appeals and the District Court recognized in this case, the Chapter 154 limitations on federal habeas were not intended as arbitrary, Procrustean measures designed solely to truncate federal review and speed executions without regard for the fundamental importance of the writ in safeguarding justice and individual freedom. *Ashmus*, 123 F.3d at 1203-04; *Ashmus v. Calderon*, 935 F. Supp. 1048, 1057-58 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997). Rather, Chapter 154 reflects a sober decision to offer a *quid pro quo* entitling States to demand accelerated federal court procedures in capital cases, but only if the States first have ensured that competent counsel have reasonably prepared each case in state court; otherwise, federal courts would be overwhelmed with the need to factually develop complex issues within a short time frame. *See, e.g., Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (Chapter 154 creates a *quid pro quo* relationship), *cert. denied*, ___ U.S.___, 117 S. Ct. 503 (1996).

Prior to and after the enactment of the AEDPA, petitioners and their agents issued press releases and made numerous public pronouncements in which they repeatedly asserted that California qualified for Chapter 154's benefits. Petitioners vowed to hasten the pace of executions by insisting on enforcement of Chapter 154's provisions. *See, e.g., Ashmus*, 935 F. Supp. at 1056 (petitioners "threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class."); *After the Lull, Bill to Speed Executions Gains Velocity*, SAN FRANCISCO DAILY JOURNAL, Aug. 9, 1995, at 1. Indeed, even after the commencement of this action, petitioners sought selectively to have district courts apply Chapter 154 provisions in pending capital habeas

proceedings.[2] *See, e.g., Ashmus*, 935 F. Supp. at 1056.

In light of petitioners' threats to invoke Chapter 154, respondent commenced this action on April 24, 1996, to resolve whether the State of California was entitled to the benefits of Chapter 154. The complaint alleged that petitioners' threats to invoke Chapter 154 created a climate of confusion and were designed to secure the benefits of Chapter 154 without the State having provided the *quid pro quo* – competent counsel and the resources necessary to develop constitutional claims in state court. Given the need for uniformity in the application of Chapter 154 and because class action habeas corpus petitions are disfavored,[3] this proceeding was filed as a class action pursuant to 42 U.S.C. section 1983 and 28 U.S.C. section 1331 on behalf of the more than 480 inmates on California's death row, more than a third of whom "are without counsel and likely to remain so for some time." *Ashmus*, 935 F. Supp at 1055.[4] Thus, to avoid duplicative litigation, and

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[2] Following the filing of this lawsuit, but before the issuance of a temporary restraining order, petitioners advanced confusing and inconsistent positions regarding Chapter 154 in California habeas proceedings. *See, e.g.*, Exhibits in Support of Reply to Opposition to Application for Temporary Restraining Order and Temporary Declaratory Relief, filed May 1, 1996. In at least one case, petitioners asserted that, not only did Chapter 154 apply, but that the habeas petitioner already was barred from filing a petition by the retroactive application of the six-month statute of limitations. *Kirkpatrick v. Calderon*, CV-96-0351 (C.D. Cal.). Before the district court in this case, petitioners initially advanced the position that Chapter 154 applied to all death row inmates in California, but that the six-month statute of limitations began to run on April 24, 1996, when President Clinton signed the legislation. Petitioners later amended their position to assert that Chapter 154 does not apply to any member of the plaintiff class whose judgment was affirmed by the California Supreme Court prior to June 6, 1989.

[3] *See, e.g., Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987); *see also Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984).

[4] The District Court certified the plaintiff class as those individuals sentenced to death by California courts, except those persons whose convictions and sentences were affirmed prior to June 6, 1989. The class currently numbers approximately 430 members. Of these, approximately 110 persons have invoked the power of the federal courts to review their judgments, approximately 160 persons are before the California Supreme Court awaiting the appointment of counsel for automatic appeal proceedings, and the remainder currently have appellate, habeas, or certiorari proceedings before the California Supreme Court or this Court. In addition, there are approximately

prevent the chaos that would result if this question were raised in every capital habeas case currently in the federal courts in California, respondent sought to resolve, in one forum, the question of whether Chapter 154 applies to California death row inmates.

Recognizing the importance of the issues presented and the irreparable injury that death row inmates faced without a judicial determination of the law governing federal habeas proceedings, the District Court expedited consideration of the procedural and substantive issues in the case, conducted three extensive hearings, and carefully considered the parties' arguments. After thoroughly analyzing the new statute, its application to California, and numerous procedural issues, on June 14, 1996, the District Court issued sixty-three typed pages of factual findings and legal conclusions. The District Court concluded that respondent satisfied all jurisdictional requirements to maintain this action, Chapter 154 does not apply to California death row inmates, and petitioners' threats to invoke its provisions caused irreparable injury to California death row inmates. *Ashmus*, 935 F. Supp. at 1074-75. The District Court issued a declaratory judgment, certified the class, and preliminarily enjoined petitioners from seeking to obtain the benefits of the new provisions. *Id.* at 1075-76.

On appeal, petitioners argued that the District Court's declaratory judgment and injunction violated the State's right to Eleventh Amendment immunity. A divided panel of the Court of Appeals, declining to follow the Fourth Circuit's decision in *Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, No. 97-5623, concluded that respondent's action fell within the exception to Eleventh Amendment immunity articulated by *Ex Parte Young*, 209 U.S. 123 (1908). *Ashmus*, 123 F.3d at 1204-05. The Court of Appeals affirmed the District Court's conclusion that California does not satisfy the prerequisites for application of Chapter 154, as well as the grant of

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fifty persons sentenced to death with cases pending in federal court whose convictions and sentences were affirmed prior to June 6, 1989, and thus are not members of the class.

declaratory and injunctive relief. *Id.* at 1209. Petitioners did not seek rehearing in the Court of Appeals, but rather sought this Court's review to "correct" the appellate court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners insist this Court exercise its plenary review powers to correct the Court of Appeals' "unprecedented encroachment on the Eleventh Amendment" and misapprehension of state law and to resolve the apparent conflict between the Ninth Circuit's and Fourth Circuit's Eleventh Amendment analysis, given the "profound ramifications" posed by such conflict. Petition at 15, 16, 21. Notwithstanding petitioners' hyperbole, the Court of Appeals' decision in this case presents no novel or critical issues worthy of this Court's consideration.

The Ninth Circuit carefully considered petitioner's Eleventh Amendment arguments and found them wanting. Faithfully applying this Court's cases interpreting the *Ex Parte Young* doctrine, the Court of Appeals correctly concluded that the Eleventh Amendment does not bar an action seeking injunctive and declaratory relief to compel state officials to act in conformity with federal law and to protect habeas petitioners' statutory and constitutional rights. This Court need not grant *certiorari* to reaffirm that such circumstances fall squarely within the *Ex Parte Young* exception to the Eleventh Amendment.

Moreover, as petitioners concede, the judicial determination made by the Ninth Circuit is one that may properly be made in individual habeas proceedings without offending the Eleventh Amendment. Far from promoting the interests of State sovereignty, requiring the applicability of Chapter 154 to be resolved in individual habeas corpus proceedings in California would be far more intrusive on the State's sovereignty than the method employed here and a tremendous waste of judicial resources. Such piecemeal litigation in California would potentially result in the State being

haled into federal courts in more than 400 proceedings to determine the same question that has been resolved quickly and efficiently in this proceeding.

Even if this Court were inclined to resolve the apparent conflict with the Fourth Circuit's decision in *Booth v. Maryland*, the Petition contains no justification for reviewing the substantive holding of the Ninth Circuit that the State of California fails to satisfy the requirements of Chapter 154. The Ninth Circuit's interpretations of the requirements of Chapter 154 fully conform to that expressed by every other court addressing the question, and the Petition points to no conflict or interpretation of Chapter 154's prerequisites that warrant this Court's attention. Instead, the Petition requests that this Court wade through a plethora of "introductory statements," "rules," "guidelines," and "policies," to determine whether the State of California qualifies under Chapter 154. Both the District Court and the Court of Appeals painstakenly analyzed the various provisions proffered by petitioner and concluded that California's "mechanism" was wholly deficient to qualify the State as an "opt-in" jurisdiction. Not even the dissent below suggests otherwise. That is no doubt attributable to the fact that the District Court's factual and legal analyses are fully supported by petitioners' repeated concessions of deficiencies in California's purported "mechanism." Indeed, the California Legislature joined the consensus of opinion that these provisions were insufficient when it recently enacted legislation in an attempt to comply with Chapter 154's requirements.

Finally, the scope of the District Court's injunction presents no justification for *certiorari*. The injunction merely prevents petitioners from attempting to obtain the benefits of Chapter 154 unfairly through the use of duplicative litigation and threats. The *quid pro quo* offered by Chapter 154 is a systemic benefit designed to apply, if at all, to a state jurisdiction as a whole. Requiring parties to present their arguments regarding Chapter 154 in one forum and binding the parties to the judicial determination of the application of Chapter 154 in California is neither a novel exercise of

judicial authority nor a reason to invoke this Court's supervisory powers.

I.

CERTIORARI IS UNWARRANTED BECAUSE THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE ELEVENTH AMENDMENT DID NOT BAR THIS ACTION AND BECAUSE ANY CONFLICT WITH THE DECISION IN *BOOTH v. MARYLAND* PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

The Eleventh Amendment generally bars suits against a state in federal court, unless the State has consented or Congress unequivocally has expressed its intent to abrogate the immunity and does so through a valid exercise of power. *Seminole Tribe v. Florida*, ___ U.S.___, 116 S. Ct. 114, 1122-23 (1996). Beginning with the decision in *Ex Parte Young*, 209 U.S. 123 (1908), however, this Court consistently has held that the Eleventh Amendment does not bar equitable suits seeking to prevent state officers from violating federal law or to ensure the supremacy of federal law. Thus, the Eleventh Amendment does not prohibit suits against state officials when "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160). Thus, the *Young* exception permits suits alleging violations of federal statutes, *see, e.g., Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030, 1034 (9th Cir. 1985), and suits to ensure that state officers' conduct "is in compliance with federal law," *Seminole Tribe*, 116 S. Ct. at 1131 n.14; *Natural Resources Defense Council v. Cal. Dept. of Trans.*, 96 F.3d 420, 422 (9th Cir. 1996) (*Young* "would be undermined if state officials were not required to act consistently with federal statutes").

The Court of Appeals applied these principles to determine that the Eleventh Amendment does not bar this action. It first concluded that the *Ex Parte Young* exception applied because the

suit sought prospective relief to ensure compliance with federal law and to protect respondent's federal rights. *Ashmus*, 123 F.3d at 1205 (until the State complies with the opt-in requirements, "it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28"). As the Ninth Circuit concluded:

> The plaintiffs satisfy this requirement. They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements . . . threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q).

Ashmus, 123 F.3d at 1204. In reaching these conclusions, the Court of Appeals relied upon the District Court's extensive -- and unchallenged -- factual findings about the nature and effect of petitioners' conduct. As the District Court found, petitioners' threats to invoke Chapter 154 in future proceedings coupled with the lack of a binding judicial determination of the applicability of Chapter 154 forced habeas petitioners to comply with the provisions, "thus secur[ing] for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits."[5]

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[5] *See also Ashmus*, 935 F. Supp. at 1057 ("Defendants' statements during the course of this litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions."); *id.* at 1056 ("Absent judicial relief from this Court, defendants threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153."); *id.* ("The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights."); *id.* at 1058 ("as a factual matter, the Court finds that defendants' threats have caused plaintiffs to forgo their statutory rights and that, absent relief from this Court, defendants' threats will continue to cause such injury"); *id.* at 1059-60 ("plaintiffs are suffering 'actual' injury because defendants have asserted, and, absent judicial relief, will continue to assert falsely that Chapter 154 governs plaintiffs' ability to file and pursue federal habeas proceedings. Because of the uncertainty created by defendants' assertions, plaintiff Ashmus will be forced to comply with Chapter 154 and to structure his habeas litigation

Ashmus, 935 F. Supp. at 1056. Notably, the Petition before this Court does not mention, let alone address, the District Court's factual findings regarding the effect of petitioners' threats to invoke Chapter 154 on capital habeas petitioners' rights.[6]

The Court of Appeals further concluded that the effect of permitting this litigation would "have little, if any, impact on the State's sovereign interest." *Ashmus*, 123 F.3d at 1205. Noting that a determination of the applicability of Chapter 154 could be made in any habeas proceeding without offending the Eleventh Amendment, the Court concluded that resolving the issue in a single universal action worked no intrusion on the State's sovereignty. As the Court of Appeals noted,

> California is not complaining about being haled into federal court to determine whether it qualifies under Chapter 154. Instead, California argues the appropriate procedure for resolving this dispute is to litigate the issue in each individual habeas proceeding, rather than in this single universal action. Whether the issue is resolved in this action or in separate individual habeas proceedings, California acknowledges the issue will be resolved by a federal court into which it is haled, if not willingly at least resignedly. *Ashmus*, 123 F.3d at 1205.[7]

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accordingly. Other members of the plaintiff class will be similarly affected.").

[6] In a footnote, petitioners raise what they believe to be the Court of Appeals' mistaken factual assumption regarding the harm caused by the uncertain application of Chapter 154. Petition at 19 n.7 (discussing issue of lack of counsel to assist habeas petitioners in filing federal petitions). Although respondent submits that petitioners are misreading the Ninth Circuit's opinion, even if petitioners' complaint were correct, it should have been included in a petition for rehearing in the Court of Appeal and does not form the proper basis for invoking this Court's jurisdiction. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

[7] Indeed, following the decision in *Booth*, petitioners urged the Ninth Circuit to adopt the following procedures: dismiss the instant case; deem the parties in respondent's habeas proceeding to have moved for declaratory judgment based on the pleadings and records in this case; order the district court to rule on the declaratory judgment; if the district court grants declaratory judgment for respondent, the district court's preliminary injunction order "shall be deemed the court's statement of decision and Calderon shall be deemed to have noticed appeal therefrom without further action on his part"; and order "[t]hat the resulting appeal shall be immediately docketed by the Clerk of this Court; that the record in 96-16141 shall be deemed the certified record in said appeal; and that on such record the cause shall be deemed fully briefed, argued, and submitted for decision of the Court." Appellants' Supplemental Responsive Brief at 14-15. Had the Court of Appeals followed petitioners' suggestion, the same panel would have resolved the same legal issues

Although petitioners allude to havoc to the State's sovereignty worked by the Ninth Circuit's decision, they have failed to explain precisely how their sovereign interests are more appreciably affected by this litigation than if petitioners had been forced to respond to motions for declaratory judgment in the approximately 160 habeas cases currently in federal court. Indeed, as the Court of Appeals concluded, "efficiency and fairness" -- interests that are central to the *Ex Parte Young* exception – compelled its conclusion. *Ashmus*, 123 F.2d at 1206. By filing this action, respondent sought a prompt resolution of the applicability of Chapter 154 in a single proceeding that binds all concerned parties. In addition to conserving limited judicial resources, resolving the dispute in this proceeding provided the only forum for the more than 300 persons sentenced to death currently on automatic appeal or in habeas proceedings in state court and for whom no federal habeas proceeding was available. Most important, the resolution of the issues in this case provide certainty, rather than the chaos and confusion that a multiplicity of suits would cause.

Without addressing the basis for the Court of Appeals' decision, petitioners insist that *certiorari* is appropriate because the decision of the Court of Appeals below conflicts with that in *Booth v. Maryland*. In *Booth*, the court held that the Eleventh Amendment bars a suit by five death-row inmates challenging Maryland's compliance with Chapter 154 because there was "no continuing violation of federal law." 112 F.3d at 143. In petitioner's view, these differing applications of the Eleventh Amendment not only conflict, but present an issue of cataclysmic proportions. *See, e.g.*, Petition at 20-21.

Notwithstanding petitioners' dire predictions and any conflict with the *Booth* decision,

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on the same record presented in this case, all without changing the ultimate result or affecting the State's sovereignty. *Certiorari* is simply not warranted to permit the State to engage in its version of judicial musical chairs.

however, there are no compelling reasons justifying the grant of *certiorari* in this case. Although petitioners assert that, as a result of the Ninth Circuit's decision, every litigation position advanced by a state official will be subjected to a lawsuit, the argument is meritless. The Ninth Circuit's Eleventh Amendment holding is extremely narrow and fact-specific: It relies upon the District Court's extensive factual findings about the insidious effect of petitioner's conduct. In addition, it is premised upon a recognition that the Eleventh Amendment presents no bar to a federal court making the same judicial determination regarding the applicability of Chapter 154 in the context of an individual habeas proceeding, as well as the critical need to resolve this issue expeditiously which was created by petitioner's overreaching conduct. Indeed, although petitioners predict that States will be subjected to all sorts of abusive litigation as a result of the decisions of the lower courts in this case, no such litigation has occurred even though this case was filed in April 1996.

II.

CERTIORARI IS UNWARRANTED TO INTERPRET THE REQUIREMENTS OF CHAPTER 154 BECAUSE THE COURT OF APPEALS' INTERPRETATION IS CONSISTENT WITH THAT OF OTHER FEDERAL COURTS.

Petitioners ask this Court to grant certiorari to resolve whether the Court of Appeals erred in determining that California's mechanism for the appointment and compensation of competent counsel does not entitle the state to the benefits enumerated in Chapter 154. Petition at i, 21-27. Although petitioners disagree with the Court of Appeals' interpretation of Chapter 154 and the inadequacy of the California scheme to fulfill the requirements Chapter 154, the Petition identifies no reasons why this Court should exercise its supervisory power. Petitioners can point to no conflict among the lower courts in interpreting the requirements of Chapter 154 because no such conflict exists. Similarly, petitioners are unable to demonstrate any national interest to be served by this

Court reviewing the intricacies of California's various "guidelines," "policies" and "procedures" to determine whether the District Court and Court of Appeals have correctly concluded that this jumble of disparate provisions does not constitute a qualifying "mechanism" under Chapter 154.

In the District Court and on appeal, petitioners asserted that the State of California met the requirements of Chapter 154's because it had established a "unitary review" procedure "by virtue of a 'comprehensive scheme of interlocking cross-implementative provisions.'" *Ashmus*, 935 F. Supp. at 1056.[8] To qualify under a unitary review procedure, the state must

> establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel. 28 U.S.C. § 2265(a).

After analyzing the myriad of provisions cobbled together by petitioners, the Court of Appeals determined that California did not comply with Chapter 154 because (1) its purported standards for competency of counsel in capital cases were not contained in a "rule of court," as required by section 2265(a), and were merely nonbinding recommendations; (2) it does not provide an adequate mechanism for compensating counsel for the investigation and presentation of collateral

[8] In the Court of Appeals, petitioners argued that the following, in combination, constituted a "rule of court of last resort" establishing a mechanism for the appointment, competency, and compensation of counsel in unitary proceedings for purposes of § 2265: (1) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" (hereafter "Rules of Court"); (2) Rule of Court 76.5; (3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council; (4) the California Supreme Court's Statement of Internal Operating Practices and Procedures; (5) the California Supreme Court's Statement of Policies Regarding Cases Arising from Judgments of Death; (6) *In re Clark*, 855 P.2d 279 (Cal. 1993); and (7) California Government Code § 68511.5. *Ashmus*, 123 F.3d at 1207.

The Petition mentions additional provisions not referred to by petitioners in the proceedings below, including: Article 6, § 6 of the California Constitution; California Government Code § 68070; California Rules of Court, Introductory Statement, Court Rules Vol. 12, pt.1 at 4; and California Penal Code § 1241. Petition at 5-8.

habeas claims, because it restricts the investigation of habeas claims to those apparent from the face of the record; and (3) it has made no *bona fide* offer of counsel as required by section 2265(b) because of the backlog of appointments resulting from chronic delays in appointing counsel.[9] *Ashmus*, 123 F.3d at 1207-08.

The Court of Appeals's interpretation of the requirements of Chapter 154 is in harmony with every other court addressing the issue. The federal courts uniformly have interpreted Chapter 154's requirements strictly, as "necessary to meaningfully effectuate the *quid pro quo* arrangement which lies at the core of Chapter 154." *Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996), *rev'd in part on other grounds, sub nom. Satcher v. Pruett*, ___ F.3d ___, 1997 WL 577684 (4th Cir. Sept. 18, 1997); *see also Scott v. Anderson*, 958 F. Supp. 330, 332 (N.D. Ohio 1997) ("the very precise language Congress chose to use in Chapter 154" requires that its provisions be strictly construed). The required mechanism for the appointment and compensation of competent counsel cannot be satisfied by "a loose collection of statutes and regulations," but must be "clear" such that it "can be seen and relied upon by indigent capital defendants." *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996); *Hill v. Butterworth*, 941 F. Supp. 1129, 1143 (N.D. Fla. 1996) ("[A] plain reading of [Chapter 154] indicates that Congress wanted . . . a specific mechanism for competent counsel.").

The mechanism must establish competency standards for counsel in state *collateral* proceedings, *Mills v. Anderson*, 961 F. Supp. 198, 202-03 (S.D. Ohio 1997) (standards of

[9] Respondent presented evidence, and both the district court and court of appeals specifically found that it routinely takes up to four years for the State to appoint counsel in capital cases and, as a result, approximately a quarter of the class members had not yet been appointed counsel at the time the preliminary injunction was entered. *Ashmus*, 123 F3d at 1208. Currently, approximately a third of the class members have not had unitary counsel appointed to represent them. *See supra* note 4.

competence for representation at trial or on direct appeal inadequate), *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996), *rev'd in part on other grounds*, ___ F.3d ___, 1997 WP 612739 (5th Cir. Oct. 3, 1997), and these standards must be "explicit," "specific" and "mandatory." *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in other part*, 105 F.3d 209 (5th Cir. 1997); *Wright v. Angelone*, 944 F. Supp. at 468 (Chapter 154 requires "binding enforcement mechanisms"). In addition, there must be a "formal, institutionalized commitment to payment of counsel and litigation expenses" in the litigation of collateral claims. *Satcher v. Netherland*, 944 F. Supp. at 1242.

Finally, the state must make a "meaningful" offer of counsel to capital prisoners; a backlog of unrepresented prisoners demonstrates that a state does not have a mechanism for appointment that complies with Chapter 154. *Hill v. Butterworth*, 941 F. Supp. at 1147. The failure of a state to meet *any one* of these criteria, or any of the other requirements enumerated in the statute, requires that it not obtain the benefits of Chapter 154. *Satcher v. Netherland*, 944 F. Supp. at 1240; *Hill v. Butterworth*, 941 F. Supp. at 1147. Applying these criteria, federal courts uniformly have concluded that no State qualifies for the benefits of Chapter 154.[10]

The Court of Appeals' conclusion that the State of California's failure to have an enforceable rule of court as required by Chapter 154 fully comports with other courts' interpretation of the provision. The lower federal courts unanimously agree concur that a State fails to meet Chapter

[10] *See Austin v. Bell*, ___ F.3d ___ n.3, 1997 WL 602670 (6th Cir. Oct. 2, 1997) (*affirming Austin v. Bell*, 927 F. Supp. 1058, 1061-62 (M.D. Tenn. 1996); *Langford v. Day*, 110 F.3d 1380, 1386 n.2 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 208 (1997) (Montana); *Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35-36 (3rd Cir. 1997) (Pennsylvania); *Mata v. Johnson*, 99 F.3d at 1267 (Texas); *Burris v. Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (en banc) (Indiana); *Mills v. Anderson*, 961 F. Supp. 198 (S.D. Ohio 1997); *Scott v. Anderson*, 958 F. Supp. 330, 331-32 (N.D. Ohio 1997); *Thomas v. Gramley*, 951 F. Supp. 1338, 1341 n.3 (N.D.Ill. 1996); *Hamblin v. Anderson*, 947 F. Supp. 1179 (N.D.Ohio 1996); *Satcher v. Netherland*, 944 F. Supp. at 1222; *Wright v. Angelone*, 944 F. Supp. at 460; *Williams v. Cain*, 942 F. Supp. at 1092; *Hill v. Butterworth*, 941 F. Supp. at 1140-41; *Zuern v. Tate*, 938 F. Supp. 468 470-72 (S.D.Ohio 1996); *Leavitt v. Arave*, 927 F. Supp. 394, 396 (D.Idaho 1996).

154's requirements if its mechanism for the appointment and compensation of competent counsel is not established by statute or "rule of court" as required by §§ 2261 and 2265. *See Mata v. Johnson*, 99 F.3d at 1267; *Mills v. Anderson*, 961 F. Supp. at 203; *Hill v. Butterworth*, 941 F. Supp. at 1143; *Zuern v. Tate*, 938 F. Supp. at 471. In addition, the lower courts have uniformly rejected petitioners' assertion, Petition at 23, that "binding or mandatory" standards are not required by Chapter 154. *See Mata v. Johnson*, 99 F.3d at 1267 (rejecting state's argument that a "flexible mechanism" qualifies under Chapter 154, because "specific, mandatory standards" are required); *Satcher v. Netherland*, 944 F. Supp. at 1242 ("If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance . . . it could have done so. However, it elected not to do so."); *Wright v. Angelone*, 944 F. Supp. at 468 (Chapter 154 requires "binding enforcement mechanisms"); *Zuern v. Tate*, 938 F. Supp. at 472 ("Congress did not write [Chapter 154] in terms of substantial compliance. Rather the section is replete with mandatory language."); *Hill v. Butterworth*, 941 F. Supp. at 1143 ("A plain reading of [Chapter 154] indicated that Congress wanted something more than general supervision [of capital counsel by] a state high court.").

Similarly, the conclusion of the courts below that California's "offer" of counsel does not satisfy the requirements of Chapter 154 because there is often a four-year delay following a prisoner's acceptance of the state's "offer" before counsel is appointed is consistent with that reached by the only other federal court confronted with the issue. *Hill v. Butterworth*, 941 F. Supp. at 1146-47.[11] Petitioner do not and cannot cite any authority suggesting Congress meant that a state may

[11] Petitioners' suggestion that Chapter 154's requirement that the state actually appoint counsel "upon" the prisoner's acceptance of an offer of counsel, § 2261, "imposes no time condition," Petition at 26, is simply not the case. The failure of Congress to define terms implies a Congressional intent that the words have their established meaning at the time the act was passed. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). Dictionary definitions are

subject death-row prisoners to up to four years of delay in appointing counsel and yet still qualify for the extremely expedited review benefits of Chapter 154.

Indeed, the California Legislature -- in an apparent concession that the provisions cited by petitioners are insufficient to qualify under Chapter 154 -- recently enacted legislation in an effort to comply with Chapter 154's requirements. Following the decision of the court of appeals in this case, and after the Petition was filed in this Court, the State of California passed 1997 California S.B. 513 (enacted Oct. 12, 1997). Senate Bill 513 creates the California Habeas Resource Center, which is to employ 30 attorneys "to represent any person convicted and sentenced to death in this state, . . . for the purpose of instituting and prosecuting postconviction actions in the state and federal courts." S.B. 513 also requires the California Judicial Council and California Supreme Court "to adopt rules of court setting competency standards for appointed counsel in death penalty appeals and habeas corpus proceedings," and authorizes the Supreme Court to compensate counsel at a higher hourly rate, as well as increase the limit on investigative funds. *Id.*

The language of Senate Bill 513 is remarkably similar to that contained in Chapter 154. For example, the legislation creates California Government Code §§ 68652 and 68653, which bear a striking resemblance to the procedures for appointment described in 28 U.S.C. § 2261(c). New California Government Code §§ 68652 and 68653 state:

> **68652.** The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in state postconviction proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.
>
> **68653.** No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests [sic] continued representation.

Given its timing and content, it cannot be doubted that Senate Bill 513 was enacted in an attempt to comply with the requirements of Chapter 154. Accordingly, despite its protestations to the contrary in this proceeding, California has conceded the clarity of Chapter 154's requirements, and that it has not in the past met the prerequisites for the competence and compensation of counsel contained in Chapter 154. This Court need not grant *certiorari* to interpret federal law where it is apparent that no question regarding its interpretation remains.

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a source used to uncover the settled meaning of statutory language. *See M.C.I. Telecommunications Corp. v. A.T. & T.*, 512 U.S. 218, 225 (1994). Dictionaries define the word "upon," when used as a preposition, as interchangeable with the word "on"; the preposition "on" when used in a temporal sense, means "at the time of." *See, e.g.*, Webster's New World Dictionary 419, 656. Therefore, in requiring the appointment of counsel "upon" the prisoner's acceptance, Congress intended that states be required to appoint counsel "at the time of" the prisoner's acceptance.

III.

THE DISTRICT COURT PROPERLY INVOKED ITS INHERENT POWER TO ENJOIN LITIGANTS FROM RELITIGATING AN EXISTING JUDGMENT IN OTHER COURTS

Despite their ability to present their arguments concerning Chapter 154's applicability in voluminous briefing before the District Court and the Court of Appeals, and now this Court, petitioners assert their right to Due Process of Law and right of access to the courts have been violated. Petition at 30. The First and Fourteenth amendments, however, do no require that litigants against whom a valid judgment has been entered be allowed to circumvent that judgment by relitigating the issues in other fora. There is no constitutional right to forum shop in the hopes of creating divergent decisions. Rather, federal courts have long had the power to enjoin litigants from

circumventing court orders.

The All Writs Act, 28 U.S.C. section 1651(a) authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977), this Court explained that the Act authorizes federal courts to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." This power extends to "persons who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 174 (internal citations omitted).

Where a litigant's actions in other court proceedings threaten to frustrate the judgment entered by a federal court, the federal court may utilize the All Writs Act to issue orders enjoining litigants from pursuing other court action that would conflict with the court's judgment. *See White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994) (federal court enjoined related actions pursued in other *fora*), *cert. denied*, 515 U.S. 1137 (1995); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (All Writs Act permits a district court to enjoin actions in [other fora] "where necessary to prevent relitigation of the existing federal judgment."); *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir.1980) (district court had the power to enjoin "any future litigation on any cause of action arising from the fact situation at issue in [the] case."); *In the Matter of VMS Securities Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996) (affirming district court's use of the All Writs Act "to prevent litigants from frustrating or circumventing its orders"); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984) ("a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive

relitigation"). Such injunctions do not violate the First Amendment. "Rules of procedure frequently force litigants into courts not of their choosing, but due process and the First Amendment require only that an impartial forum be available to litigants, and not that the doors of every courtroom in the land be open to them." *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987). Petitioners can make no showing that the District Court provided an inadequate forum for resolution of the applicability of Chapter 154 in California.

CONCLUSION

The District Court conducted an exhaustive inquiry into the issues in this case and resolved those issues in extensive factual findings and legal conclusions. Similarly, the Court of Appeals examined the extensive record in this case and a majority concluded that petitioner's arguments were meritless. Petitioners have failed to establish grounds for this Court to review the circuit court's decision. The petition for *certiorari* to review the judgment of the Court of Appeals should be denied.

DATED: November 4, 1997

Respectfully submitted,

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APPENDIX

1997 California Senate Bill No. 513, California 1997-98 Regular Session
Enacted: October 12, 1997

An act to amend Sections 15402 and 15421 of, and to add Chapter 2.1 (commencing with Section 68650) to Title 8 of, the Government Code, relating to appellate representation.

LEGISLATIVE COUNSEL'S DIGEST

SB 513, Lockyer. Appellate Representation: State Public Defender: California Habeas Resource Center.

Existing law establishes the Office of the State Public Defender, as specified, and specifies the powers and duties of that office. It also authorizes the Supreme Court to appoint and employ specified personnel, including phonographic reporters, assistants, secretaries, librarians, and bailiffs.

This bill would revise the existing authorization for representation by the State Public Defender to authorize the State Public Defender to represent any person financially unable to employ appellate counsel in capital cases, and in specified noncapital appeals; and to hire additional counsel and support staff, as specified. The bill would also create the California Habeas Resource Center in the judicial branch of state government, specify its powers and duties, and provide for an executive director and board of directors, appointed as specified. The bill would also require the Judicial Council and the Supreme Court to adopt rules of court setting competency standards for appointed counsel in death penalty appeals and habeas corpus proceedings; and authorize the Supreme Court to compensate appointed counsel in death penalty appeals and postconviction proceedings at a rate of at least $125 per hour, as specified, and to raise the limit on investigative and other expenses for such counsel, as specified, to $25,000 without an order to show cause.

TEXT:

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 15402 of the Government Code is amended to read:

15402. The State Public Defender may employ deputies and other employees, and establish and operate offices, as he or she may need for the proper performance of his or her duties. The State Public Defender may contract with county public defenders, private attorneys, and nonprofit corporations organized to furnish legal services to persons who are not financially able to employ counsel and pay a reasonable sum for those services pursuant to the contracts. He or she may provide for participation by those attorneys and organizations in his or her representation of eligible persons. The attorneys and organizations shall serve under the supervision and control of the State Public Defender and shall be compensated for their services either under those contracts or in the

manner provided in Section 1241 of the Penal Code.

The State Public Defender may also enter into reciprocal or mutual assistance agreements with the board of supervisors of one or more counties to provide for exchange of personnel for the purposes set forth in Section 27707.1.

The office of the State Public Defender may hire 15 additional staff attorneys and the support staff necessary for proper implementation of Section 15421.

SEC. 2. Section 15421 of the Government Code is amended to read:

15421. Upon appointment by the court or upon the request of the person involved the State Public Defender is authorized to represent any person who is not financially able to employ counsel in the following matters:

(a) An automatic appeal to the Supreme Court under Section 11 of Article VI of the California Constitution and subdivision (b) of Section 1239 of the Penal Code.

(b) A petition for a writ of certiorari to the United States Supreme Court with respect to a judgment on the automatic appeal to the Supreme Court under Section 11 of Article VI of the California Constitution and subdivision (b) of Section 1239 of the Penal Code.

(c) An appeal in a noncapital, criminal case as long as the State Public Defender is fulfilling the responsibilities to provide representation imposed pursuant to subdivisions (a) and (b), or the State Public Defender determines that taking a limited number of those cases is necessary for staff training.

SEC. 3. Chapter 2.1 (commencing with Section 68650) is added to Title 8 of the Government Code, to read:

CHAPTER 2.1. CALIFORNIA HABEAS RESOURCE CENTER

68650. As used in this chapter, "center" means the California Habeas Resource Center, and "board" means the board of directors of the center.

68651. There is hereby created in the judicial branch of state government the California Habeas Resource Center, which shall have all of the following general powers and duties:

(a) To employ up to 30 attorneys who may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state, who is without counsel and who is determined by a court of competent jurisdiction to be indigent, for the purpose of instituting and prosecuting postconviction actions in the state and federal courts, challenging the legality of the judgment or sentence imposed against that person, and preparing petitions for executive clemency. Any such appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution.

(b) To file motions seeking compensation for representation and reimbursement for expenses pursuant to Section 3006A of Title 18 of the United States Code when providing representation to indigent persons in the federal courts, and transmit those payments to the treasurer for deposit in a special account in the General Fund which, upon appropriation, shall be available for the purposes of the center.

(c) To work with the Supreme Court in recruiting members of the private bar to accept death penalty habeas case appointments.

(d) To establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings in capital cases.

(e) To establish and periodically update a roster of experienced investigators and experts who are qualified to assist counsel in postconviction proceedings in capital cases.

(f) To employ investigators and experts as staff to provide services to appointed counsel upon request of counsel, provided that where the provision of those services is to private counsel under appointment by the Supreme Court, those services shall be pursuant to contract between appointed counsel and the center.

(g) To provide legal or other advice or, to the extent not otherwise available, any other assistance to appointed counsel in postconviction proceedings as is appropriate where not prohibited by law.

(h) To develop a brief bank of pleadings and related materials on significant, recurring issues which arise in postconviction proceedings in capital cases and to make those briefs available to appointed counsel.

(i) To evaluate cases and recommend assignment by the court of appropriate attorneys.

(j) To provide assistance and case progress monitoring as needed.

(k) To timely review case billings and recommend compensation of members of the private bar to the court.

(l) The center shall annually report to the Legislature, the Governor, and the Supreme Court on the status of the appointment of counsel for indigent prisoners in postconviction capital cases, and on the operations of the office. On or before January 1, 2000, the office of the Legislative Analyst shall evaluate the available reports.

68652. The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

(a) The appointment of one or more counsel to represent the prisoner in postconviction state

proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

(c) The denial to appoint counsel upon a finding that the person is not indigent.

68653. No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests continued representation.

68654. (a) The center shall be managed by an executive director who shall be responsible for the day-to-day operations of the center.

(b) The executive director shall be chosen by a five-member board of directors and confirmed by the Senate. Each Appellate Project shall appoint one board member, all of whom shall be attorneys. However, no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board. The executive director shall serve at the will of the board.

(c) Each member of the board shall be appointed to serve a four-year term, and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation, but shall be reimbursed for all reasonable and necessary expenses incidental to their duties. The first members of the board shall be appointed no later than February 1, 1998.

(d) The executive director shall meet the appointment qualifications of the State Public Defender as specified in Section 15400.

(e) The executive director shall receive the salary that shall be specified for the executive director in Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2.

68655. The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

68656. (a) The Supreme Court may compensate counsel representing indigent defendants in automatic appeals arising out of a judgment of death or for state postconviction proceedings in those cases, at a rate of at least one hundred twenty-five dollars ($125) per allowable hour, as defined by the court's Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants. However, nothing in this section is intended to prohibit the hiring of counsel under a flat-fee arrangement.

(b) The Supreme Court may raise the guideline limitation on investigative and other expenses

allowable for counsel to adequately investigate and present collateral claims to up to twenty-five thousand dollars ($25,000) without an order to show cause.

(c) It is the intent of the Legislature that payments to appointed counsel be made within 60 days of submission of a billing.

(4)

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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996
No. 97-391

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In urging this Court to deny certiorari, respondent asserts (*1*) that the "apparent" conflict between the Ninth Circuit's construction of the Eleventh Amendment in this case and Fourth Circuit's decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), *petition for cert. filed,* No. 97-5623, "presents no issue of national importance"; (*2*) that because "no conflict" of decision exists at all concerning the application of Chapter 154 in California, that issue is now "unimportant"; and (*3*) that the injunction barring California officials from ever again questioning—in *any* court—the soundness of the lower federal courts' decisions in this case entails no encroachment on those officials' constitutional right and duty to advocate on

behalf of the state's interests, but merely illustrates the federal's judiciary's "inherent" power under the "All Writs Act" to ensure that its decisions will not be "circumvented" by subsequent judicial reconsideration.

A. *The* Booth-Ashmus *Conflict*

Ashmus "declin[ed] to follow . . . *Booth*" (Brief in Opposition ("Opp.") at 6), and the resulting conflict is one of grave constitutional proportions: *Booth* holds that the Eleventh Amendment bars suits brought to enjoin state officials from asserting their views on a question of federal statutory construction, while *Ashmus* deems such suits authorized under *Ex Parte Young* on the theory that state officials' assertions about the state of the law will, *if incorrect*, "irreparably injure" the rights of those who hold opposing views. No "factual" findings (Opp. at 13) underlie this form of hypothesized "injury"; rather, its supposed existence in this case depends entirely on the assumption—the purely *legal* assumption—that the death row inmates' understanding of which "law [will] govern[] federal habeas proceedings" (Opp. at 5) is correct, and that state officials' differing views based on their reading of Chapter 154 are therefore necessarily "false[]." App. 39a.[1] Thus, as the Ninth Circuit noted, "*the basis for the injunction*" is "the district court's *determination that California does not comply with Chapter 154*" (App. 8a-9a

1. The "record" on which this case was ultimately decided consists entirely of *legal* provisions—specifically, those provisions of California law that constitute its unitary review mechanism. Respondent's suggestions to the contrary notwithstanding, the issue is not otherwise "fact-specific," and respondent never introduced one iota of evidence (nor would it matter even if he had) that any death row inmate in California ever took any action, or failed to take any action, on account of anything state officials "asserted" about the applicability of Chapter 154.

(emphasis added)), not any "factual findings about the nature and effect of petitioners' conduct" otherwise. *See* Opp. at 11.

While sensitive to the "importance" of securing "a judicial determination of the law governing federal habeas proceedings" in California (Opp. at 6), respondent sees no "national importance" in identifying, at the outset, the federal constitutional constraints that will affect such efforts in *every* state. That there was a right way and a wrong way of securing a judicial determination in this case hardly made the choice "unimportant," except of course to someone who remains resolutely unattuned to the difference between a court's (*1*) considering (and perhaps even rejecting) the state's views on a disputed legal question that arises in the course of litigation (*see* Opp. at 11 n. 7) and (*2*) enjoining the state (under pain of contempt) from even *expressing* its position to any other court wherein the issue is of equal or perhaps even greater importance.[2]

2. By finally acknowledging that judicial determination of Chapter 154's applicability "may properly be made in individual habeas proceedings" (Opp. at 7; *see also id.* at 16 n. 10 & authorities cited therein), respondent effectively concedes that his suit was not "necessary," and thus that it is not authorized by *Ex Parte Young*. *See* Opp. at 9 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex Parte Young* 209 U.S. 123, 160 (1908)); *compare* SER 6 (respondent asserting that his suit provided "the only vehicle" for determining Chapter 154's applicability). By their nature, coercive remedies, as compared with legal remedies, will often prove more "efficient," "effective," and "convenient" for one party; fortunately, however, any actual dispensation of such relief is governed by more exacting standards—especially if the threat of contempt is to be leveled against conduct that is both constitutionally protected and undertaken in furtherance of an important state interest.

The constitutional issue at the heart of the *Booth-Ashmus* conflict requires resolution as urgently as any arising under the AEDPA. Indeed, if a state can be enjoined from expressing its legal positions based on the assumption that its positions are erroneous and thus "injurious" to the civil rights of persons holding some different view, then the Ninth Circuit's decision in this case has ramifications well beyond the habeas context. Even the district court acknowledged as much, but felt the fallout from its own "exten[sion]" of the law could be "limit[ed]" to lawsuits initiated by persons sentenced to death. App. 47a-48a. The Eleventh Amendment contains no "death penalty exception," however, and the Ninth Circuit's single-minded focus on matters of "efficiency" and "cost" (neither of which it accurately assessed) bespeaks no respect for such a "limitation." Respondent, never able to suggest any other limitation, now finds himself reduced to observing that none of the pernicious effects *Ashmus* is sure to generate beyond the capital habeas context has yet to be reported. *See* Opp. at 13.

Given the recency of the Ninth Circuit's *Ashmus* decision, respondent's peek into the advance sheets scarcely demonstrates that the resulting split with *Booth* "presents no issue of national importance." Although the Ninth Circuit initially took *Ashmus* under submission in September of 1996, its published opinion did not issue until August 18th of this year (some four months after the Fourth Circuit issued its decision in *Booth*). By that time, California officials, knowing of the pending certiorari petition in *Booth* and having already suffered under the district court's unconstitutional injunction for nearly a year and a half, prepared the instant petition for filing 16 days later on September 5. Thus, although the state, by acting expeditiously, has done what it can to achieve some modest measure of short-term "damage control," only this Court can ensure the future protection of those values

embodied in the Eleventh Amendment but now imperiled by the Ninth Circuit's refusal to follow *Booth*.

The immediate and widespread impact of the *Ashmus* litigation *within* the habeas context is palpable, respondent's actions having inspired the filing of virtually identical suits by death row inmates in at least three other states. Although the ensuing mischief in Maryland and Pennsylvania was largely brought under control *before* the court of appeals' decision in *Ashmus*, see *Booth v. Maryland*, 940 F.Supp. 849 (D. Md. 1996)(rejecting state officials' Eleventh Amendment defense), *rev'd*, 112 F.3d 139 (CA4 1997); *Death Row Prisoners v. Ridge*, 948 F.Supp. 1258, 1274 (E.D. Pa. 1996)(following district court decision in *Ashmus*), *terminated by "respective declarations of counsel,"* 106 F.3d 35, 36 (CA3 1997), one of the enduring costs of all that litigation is the very intercircuit conflict identified in these proceedings. The problem will not soon go away, *e.g.*, *Hill v. Butterworth*, 941 F.Supp. 1129, 1136 (N.D. Fla. 1996)(following district court decision in *Ashmus*), *appeal pending*, (CA11), and indeed will only recur and intensify as other capital states introduce Chapter 154-qualifying review mechanisms.

B. *Chapter 154*

California offers collateral representation to all death row inmates; makes all such appointments in response to inmate request, by written order, and pursuant to published competency standards; and statutorily guarantees every appointed counsel a reasonable sum for compensation and necessary expenses. Nevertheless, the Ninth Circuit, in a decision faithful to none of the relevant provisions of state or federal law, concluded that California does not qualify under Chapter 154 on account of the state's failure to do things ranging from the imprudent (removing all judicial discretion from the task

of administering counsel standards) to the impossible (completing every appointment of counsel no later than "at the time" it is requested). *See* Opp. at 17-18 & n. 11. Respondent now seeks to insulate that ruling from all further scrutiny by assuring this Court that the Ninth Circuit's decision is "in harmony with every other court addressing the issue." Opp. at 15; *id.* at 8 ("fully conform"); *id.* at 13 ("no conflict"); *id.* at 16 & n. 10 ("unanimously agree").

But the only case to consider *California's* compliance is *Ashmus* itself, and given that both lower courts were concerned with avoiding "divergent . . . opinions" (App. 13a) and "inconsistent adjudications" (App. 57a) to the point of effectively denying any other court the opportunity to pass upon the question (see App. 59a-60a), the absence of any direct "conflict" counts for little. Nor, of course, does the *Ashmus* decision enjoy any meaningful state of "harmony" with cases from Florida (where fair consideration of the issue was also foreclosed by a similar injunction imposed on state officials), or Ohio (where statutory authorization existed for *rejecting* requested representation, the only published counsel standards were concededly *inapplicable* to collateral counsel, and appointments were *not* made by order of any court), or Tennessee (where the *only* standard was bar membership), or Virginia (which extended *no* offers of counsel and whose relevant statute contained "*no* mention of compensation"), or Texas (where there were no written standards *at all*), or Indiana, Illinois, Louisiana, Montana, and Idaho (where claims of compliance were *never even advanced* by the states). *See* authorities cited in Opp. at 15-17 & n. 9.

Respondent suggests that the Ninth Circuit's failure to understand the nature and effect of California's unitary review mechanism might be explained by petitioners' own failure to acquaint the court with some relevant provisions

of state law—including the statutes that expressly guarantee counsel reasonable compensation and authorize all courts to promulgate their own "rules of court." Opp. at 14 n. 8. Although it is apparent that the Ninth Circuit failed to consider a number of key state provisions, it cannot be because they were "not referred to by petitioners in the proceedings below." *Id.; see* (*1*) Cal. Const., art. 6, § 6, *cited and quoted in* Appellants' Opening Brief ("AOB") 51-52 and Respondent's Brief ("RB") 39; (*2*) Cal. Gov't. Code § 68070, *cited in* Appellants' Reply Brief ("ARB") 25; (*3*) Cal. Rules of Court, Introductory Statement, *cited and quoted in* AOB 52; *quoted in* RB 39; and *cited twice more in* ARB 22 n. 10; and (*4*) Cal. Pen. Code § 1241, *cited and quoted in* AOB 11, 53, 56.[3]

Finally, respondent argues that questions about the correctness of the Ninth Circuit's construction of the AEDPA and relevant provisions of California law merit no attention because the state very recently reformed its capital review procedures (effective next year) and thereby issued an "apparent concession" that its existing mechanism does not comport with Chapter 154. The latest legislative action imports no "concession" of any sort; it was taken primarily to address a long-standing concern relating to delays in *state* practice, a concern that substantially predates, and exists quite independent of, the state's interest in expediting *federal* proceedings through application of Chapter 154. In fact, the principal

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3. As for the Ninth Circuit's evident failure to understand that no amount of delay in the appointment of *state* counsel will cause an inmate to be "without counsel" during any portion of the 180-day period permitted for the filing of a *federal* petition (which occurs only after the process has run its course), respondent "submits" that we have "misread the Ninth Circuit's opinion," but suggests no way to construe the court's repeated comments on that subject as anything other than evidence of confusion. *Compare* Opp. at 11 n. 6 *with* Pet. at 19 n. 7 & *id.* at 27.

reconfiguration of state procedure effected by the new reforms resulted from careful long-term study initiated well before the *Ashmus* rulings and, indeed, well before passage of the AEDPA. *See generally Hill v. Butterworth*, 941 F.Supp. at 1159 attach n. 16 ("Shevin Report" (Feb. 26, 1996))(citing information provided by the Executive Director of the California Appellate Project). Of course, with reform, not regression, being its overarching objective, the legislature naturally avoided any changes that would take the state *out* of compliance with Chapter 154. The exacting care with which that objective was fulfilled provides no evidence of earlier non-compliance.

Moreover, because application of Chapter 154 to federal proceedings "should be determined by examining [the state mechanism] as it existed at the time a petitioner first received appointment of counsel in the [state] post-conviction process," *Wright v. Angelone*, 944 F.Supp. 460, 463 (E.D. Va. 1996), California's new reforms can have no effect on the vast majority of its current death row population; rather, it is the decision in *this* case that will define "the law governing [the] federal habeas proceedings" of no fewer than 370 state prisoners whose counsel were appointed under the unitary review procedures employed in California since 1989. *See* Opp. at 5-6 & n. 4. Correct construction and application of Chapter 154 is clearly a matter of national importance, and nowhere is it more important than in this case.

C. *The Injunction on All Future Advocacy by the State*

Although the "All Writs Act" played no part whatsoever in the decisions of the district or circuit courts, respondent now identifies it as the basis for the judgment enjoining state officials from so much as *expressing* their views on an important question of law presented in approximately 109 habeas proceedings pending in other

district courts throughout California or on appeal to the Ninth Circuit. Opp. at 20; *see id.* at 5 n. 4. The effort fails.

The All Writs Act authorizes the issuance of "such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). The district court here had jurisdiction to resolve any *habeas* proceeding *respondent* might have wished to bring and, in the course thereof, to determine any questions of law concerning application of Chapter 154, but it never "otherwise obtained" jurisdiction over other habeas proceedings pending before different courts of co-equal or greater dignity. Respondent's separately-filed class action "civil rights" suit is barred by the Eleventh Amendment, and enjoining state officials from expressing their views in other proceedings was not necessary to prevent "frustration" of any ruling the district court might issue in *respondent's* habeas action. Indeed, the availability of ordinary habeas procedure to decide Chapter 154's application having now been conceded, the utter *impropriety* of respondent's reliance on the All Writs Act is also manifest: "Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985).

Respondent can identify no circumstances warranting the Ninth Circuit's continued interference with the constitutional rights and duties of state officials. State officials' ongoing advocacy in other cases neither threatens to deprive the district court of its jurisdiction over respondent's habeas claims nor jeopardizes that court's

ability to "enforce" or "facilitate" any voluntary "settlement" of his habeas action. *Compare* Opp. at 20 & authorities string-cited therein. State officials also have never "forced" any habeas petitioner "in and out of" federal court or otherwise "abused the court system." *Compare, e.g., United States v. Harrelson*, 613 F.2d 114, 116 (CA5 1980), *cited in* Opp. at 20. Finally, state officials are not demanding that "the doors of every courtroom in the land be open to them." *Compare Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (CA8 1987), *quoted in* Opp. at 21. Rather, we seek restoration of our right to be *heard* on issues of consequence to the adjudication of attacks on state criminal judgments. The right to "raise all legal issues, even if they have been decided adversely . . ., in order to preserve them for future review," *Hill*, 941 F.Supp. at 1158, does not exist for the benefit of everyone except the state.

Respectfully submitted,

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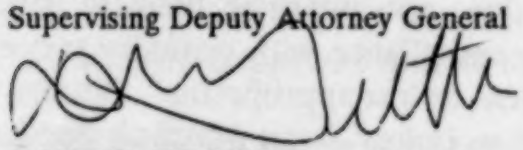

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November 13, 1997

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No. 97-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, et al.,
Petitioners,

vs.

TROY A. ASHMUS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals in the present case affirmed an injunction issued by the District Court, which forbade the state Attorney General and other state officials from arguing, in actions brought against them in other courts, their position on an unsettled, debatable question regarding the interpretation of an Act of Congress. This raises the following questions:

1. Is the assertion in a court of law of such an argument a "violation of federal law" of the kind necessary to qualify for the *Ex parte Young* exception to Eleventh Amendment immunity?

2. Is the issuance of such an injunction a proper use of the equitable powers of the court, or is it an abuse of discretion?

IN THE

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ARTHUR CALDERON, Warden, et al.,

Petitioners,

vs.

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Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The injunction issued in the present case is an unprecedented intrusion upon the Attorney General's ability to repre-

sent the people of the state in courts of law. Such interference is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reason, *amicus* requests leave to file its brief.

November, 1997

Respectfully submitted,

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Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, et al.,

Petitioners,

vs.

TROY A. ASHMUS, et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The present case began over 13 years ago.[1]

"Most of the basic facts [of Ashmus' crime] were essentially undisputed at trial.

"About 4 o'clock on the afternoon of Saturday, May 19, 1984, Marcella (Marcie) D., who was seven years of age, rode to Howe Park in Sacramento on her bicycle. There she met her brother Arby, age 10, who was responsible for her, and Arby's friend Ernesto (P.J.) G., age 9. Arby and P.J. walked to a pond to fish from a dock, and Marcie went to play with some children within a few feet of the boys.

"Defendant, who was 22 years old, approached Arby and P.J. as they were fishing. For the past few days he had been

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

camping in an area in adjacent Santa Anita Park called Stoner's Pit, a site that was filled with litter but also secluded and covered with vegetation. He gave the boys advice and help in their fishing, and stayed nearby.

"About 5 or 5:30 p.m., Arby and P.J. walked to the park clubhouse. Marcie soon rode up. She said that she was going off to Santa Anita Park with defendant: he had told her that he knew of a duck's nest there, and that he would give her a duckling if any had hatched. The boys said that she should return in about an hour.

"Defendant and Marcie proceeded to Stoner's Pit. Once there, he subjected her to a fatal attack. He raped her and perhaps also penetrated her with some foreign object, making a very large tear through the length of her vagina to within a quarter of an inch of her rectum. He sodomized her, inflicting two small wounds in the anal or rectal tissue. He possibly committed oral copulation by inserting his penis into her mouth. He evidently ejaculated over her body. He stuffed into her mouth and throat material including two plastic bags, a piece of cellophane about six inches long and two to three inches wide, and a pair of red shorts she had been wearing; the bags were wedged side-by-side in separate tight wads deep in her throat with the cellophane in between; the shorts were tightly compressed within her mouth; the bags obstructed her throat and caused her to die by asphyxiation. Covering her naked body with a carpet remnant he had used for a sleeping mat during his stay at Stoner's Pit, he fled the scene." *People* v. *Ashmus*, 54 Cal. 3d 932, 952-953, 820 P. 2d 214, 222 (1991).

The jury found Ashmus guilty of rape, sodomy, lewd acts on a child, and murder. It found true the "special circumstances" that the murder was committed in the course of the three sex crimes, making Ashmus eligible for capital punishment, and in the penalty phase the jury returned a verdict of death. *Id.*, at 952, 820 P. 2d, at 222. The California Supreme Court affirmed in a thorough, unanimous opinion by Justice Mosk, spanning 81 pages in the official reports. *Id.* That was almost six years ago.

Ashmus filed an application for counsel and stay in federal court on February 17, 1993. See *Ashmus* v. *Calderon*, 935

F. Supp. 1048, 1054, App. to Pet. for Cert. 26a-27a (ND Cal. 1996). The case has been in federal district court for over four years now.

On April 24, 1996, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Sections 101 through 106 of that Act contain a number of reforms of general habeas law. Section 107 added Chapter 154 to U. S. Code Title 28, containing additional reforms contingent upon the state adopting qualifying measures regarding appointment of counsel.

The Attorney General of California, a defendant in the present case, has taken the position that California qualifies for Chapter 154. Rather than litigate this question in his habeas proceeding, Ashmus filed the present civil action, seeking declaratory and injunctive relief. He filed that action April 24, the same day the President signed the Act.

The District Court granted declaratory relief that Chapter 154 does not apply to California. 935 F. Supp., at 1075, App. to Pet. for Cert. 76a. Further, the court granted injunctive relief:

> "[D]efendants . . . ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any class members." *Id.*, at 1076, App. to Pet. for Cert. 78a-79a.[2]

The Court of Appeals affirmed, modifying the injunction only slightly to allow state officials to argue that future changes may qualify for Chapter 154. App. to Pet. for Cert. 21a.

SUMMARY OF ARGUMENT

The Eleventh Amendment precludes this suit, because an essential element of the *Ex parte Young* exception is missing.

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2. Interpreted literally, this injunction would even forbid the present certiorari petition. Such an order would be void. See *In re Chetwood*, 165 U. S. 443, 461 (1897).

Defendants do not seek to enforce any unconstitutional statute, and they have neither committed nor threatened any violation of federal law. The mere assertion in a court of law of a good-faith argument is not a "violation," within the meaning of *Young*, regardless of its effect on the plaintiff.

Even if the District Court did have jurisdiction, the issuance of an injunction in this case was an improper exercise of equitable power. To enjoin the Attorney General from asserting a good-faith argument in other cases before other courts, which have been filed *against* state officials, not by them, is a massive and unprecedented intrusion upon the discretionary responsibilities of an executive officer. Further, the preliminary injunction was neither necessary nor effective to resolve the uncertainty in the law. Only a final judgment can do that.

ARGUMENT

The District Court in the present case issued an injunction of breathtaking audacity. That order forbids officers of the state from asserting a good-faith position on an important unsettled question of law in other cases in other courts before other judges. These other cases, furthermore, were not commenced *by* these officers, but rather have been or will be brought *against* these officers, as respondents, by the members of the plaintiff class.

Petitioners assert that the Eleventh Amendment precludes this suit altogether. The argument on this point is ably presented in the petition, in the Fourth Circuit's opinion in *Booth* v. *Maryland*, 112 F. 3d 139 (1997), and in Maryland's Brief in Opposition in that case, No. 97-5623. *Amicus* will add only a brief argument in part I. Yet even if the suit were not jurisdictionally precluded, the question would remain whether this was a proper use of the injunctive power. The existence of the power and the propriety of its use are separate questions. Compare *Marbury* v. *Madison*, 1 Cranch 137, 173, 176 (1803) (original mandamus would be proper remedy, but Supreme Court had no jurisdiction to issue it) with *Ex parte Watkins*, 3 Pet. 193, 208-209 (1830) and *Ex parte Watkins*, 7 Pet. 568, 572-574 (1833) (Supreme Court had jurisdiction to issue original habeas, but writ did not lie to attack final judgment). That argument is presented in parts II and III.

I. *Ex parte Young* has been, and should remain, limited to injunctions against enforcement of unconstitutional statutes and violations of federal law, neither of which has occurred in this case.

Under the Eleventh Amendment, a private party's suit in federal court "against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U. S. 89, 102 (1984). On its face, this principle would appear to preclude all suits against state officers acting in their official capacities, since "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 138 L. Ed. 2d 438, 448, 117 S. Ct. 2028, 2034 (1997).

The rule of *Ex parte Young*, 209 U. S. 123 (1908), permitting such suits, is an exception. *Coeur d'Alene*, at 447, 117 S. Ct., at 2034. That exception "rests on a fictional distinction between the official and the State." *Id.*, at 448, 117 S. Ct., at 2034. That fiction does not extend to every prospective relief case. *Ibid.* It must be applied judiciously to "ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent *violations* of federal law." *Ibid.* (emphasis added).

"In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be *illegal*." *Papasan* v. *Allain*, 478 U. S. 265, 277 (1986) (emphasis added). Even in *Coeur d'Alene*, where this Court was deeply divided on other aspects of the Eleventh Amendment, there was unanimity on this point. An essential element of the *Young* exception is a violation of federal law. See 138 L. Ed. 2d, at 455, 117 S. Ct., at 2040 (majority) ("on-going violation of federal law"); *id.*, at 463-464, 117 S. Ct., at 2046 (O'Connor, J., concurring in part and concurring in the judgment) (same); *id.*, at 467, 117 S. Ct., at 2048 (Souter, J., dissenting) ("The plaintiff must allege that the officers are acting in violation of federal law . . .").

The action proposed by the Attorney General which led to the present case was to assert in a court of law a plausible, good-faith

argument regarding the interpretation of an Act of Congress. Plaintiff contends, and the lower courts held, that this assertion would have the practical effect of forcing them to forego certain federal rights.[3] But impact on the plaintiff is not the test. A legal act is a legal act, and not a violation, even if it does have the effect claimed. For example, a prosecutor who puts on a compelling case of guilt may, as a practical matter, force a defendant to give up his Fifth Amendment right and take the stand, but that effect does not transform skilled advocacy into a constitutional violation. See *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970). "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993).

Young found the requisite violation in a stated intent to commence prosecutions under an unconstitutional statute, even though the constitutionality has not been previously determined. See *Young*, *supra*, 209 U. S., at 160. That is something of a stretch, but by this point it is well established in precedent. The present question is whether that stretch should be further stretched to cover a contention made in court where there is no question of an unconstitutional statute or other illegality of the official's action. The answer to that question is also well established in precedent. The answer is no.

Worcester County Trust Co. v. *Riley*, 302 U. S. 292 (1937) involved the taxes on the estate of a decedent whose state of domicile was disputed. Massachusetts and California both claimed him and the right to tax the intangibles of his estate. *Id.*, at 294. Plaintiff, the administrator, filed an interpleader, *ibid.*, claiming that the effect of the state officials' actions threatened to deprive the estate of its federal right against double taxation. *Id.*, at 297-298.

The Court unanimously held the action barred by the Eleventh Amendment, distinguishing *Young*. First, the state officials were

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3. Actually, it is not the Attorney General's assertion but *the possibility he may be right* that has this effect. If the Attorney General's position were patently wrong, and certain to be rejected by the courts, its assertion would be of little or no concern to plaintiffs.

simply and properly seeking a judicial determination of whether their position was correct, an act well within their official duties. *Id.*, at 298-299. Second, unlike *Young* and its progeny, "the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it." *Id.*, at 300.

These principles apply with full force to the present case. The Attorney General seeks to enforce the single most important law the state has: the law which defines and punishes murder. To this end, he must defend against habeas corpus actions which seek to overturn valid judgments. The defense of such cases and the choice of arguments to present falls squarely within his constitutional responsibilities. There is no basis for asserting that he lacks authority for his actions or seeks to enforce an unconstitutional statute.

Worcester County remains good law today. *Cory* v. *White*, 457 U. S. 85, 86 (1982) involved a similar dispute regarding the estate of Howard Hughes. The Court of Appeals thought "that *Edelman* v. *Jordan*, 415 U. S. 651 (1974) had silently, but effectively, overruled *Worcester*," *id.*, at 88. *Edelman* did no such thing. *Id.*, at 90.

> "Neither did *Edelman* deal with a suit naming a state officer as defendant, but *not alleging a violation of either federal or state law*. Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in *Worcester* that the Eleventh Amendment bars suits against state officers unless they are alleged to be acting contrary to federal law or against the authority of state law. *Edelman* did not hold that suits against state officers who are not alleged to be acting against federal or state law are permissible under the Eleventh Amendment if only prospective relief is sought. Whether or not that would be the preferable rule, *Edelman* v. *Jordan* did not adopt it.
>
> "Furthermore, if that were to be the law, *Worcester* must in major part be overruled. We are unwilling, however, to overrule that decision and narrow the scope of the Eleventh Amendment to the extent that action would entail." *Id.*, at 91 (emphasis added).

For the Attorney General of California to argue to a federal court that California qualifies for Chapter 154 of Title 28, United States Code is not, by any stretch of the imagination, a violation of any law, state or federal. The *Ex parte Young* exception is inapplicable. The Eleventh Amendment bars this action against state officials acting in their official capacity.

In a habeas corpus action, the habeas petitioner does allege a violation of federal law. He alleges that he is being held in custody in violation of the Constitution, laws, or treaties of the United States. The federal habeas court cannot grant relief on any other basis. 28 U. S. C. § 2254(a). Hence, habeas cases always qualify for the *Ex parte Young* exception.

The underlying question need only be resolved in one such case. If the habeas petitioner prevails and California is held not to qualify, the final judgment in that case would settle the question, as much as it can be settled, by *stare decisis*. See part III B, *infra*, at 14-20. There is, therefore, no need to further stretch the already strained fiction of *Ex parte Young*.

II. The injunction issued in this case was an unprecedented, improper use of judicial power.

Review on writ of certiorari is appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . . ." Supreme Court Rule 10(a). For the reasons that follow, *amicus* CJLF submits that the injunction issued by the District Court, and its affirmance by the Court of Appeals, are prime examples of such departure.

There is a large body of case law dealing with requests for injunctions forbidding an official from commencing or prosecuting a suit in another court on the ground that the statute or ordinance sought to be enforced is unconstitutional. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 39 (1971). A smaller body of case law deals with requests for injunctions to prevent a party or witness from presenting evidence wrongfully obtained in another court. These cases generally hold such injunctions to be improper.

See, *e.g.*, *Perez* v. *Ledesma*, 401 U. S. 82, 84-85 (1971); *Stefanelli* v. *Minard*, 342 U. S. 117, 122-123 (1951); *People* v. *Gonzales*, 20 Cal. 2d 165, 171, 124 P. 2d 44, 47 (1942) (Traynor, J.); but see *Rea* v. *United States*, 350 U. S. 214, 217 (1956); see also *Baker* v. *General Motors Corp.*, 86 F. 3d 811, 818-820 (CA8 1996), cert. granted No. 96-653 (argued Oct. 15, 1997).

The present case is a large step further removed. The state officials have done nothing wrong. They are respondents in actions commenced against them and have an honest, good-faith argument to make on an unsettled question of law. Yet they are forbidden to make it. Except for the other AEDPA cases, there appears to be no precedent for such an injunction in American law.[4]

A. NAACP v. Meese.

The closest case *amicus* has found is *NAACP* v. *Meese*, 615 F. Supp. 200 (DC DC 1985). That case arose in the aftermath of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U. S. 561 (1984), a case involving racially-based layoffs by a fire department under a consent decree. Attorney General Meese had "a far different and broader interpretation" of *Stotts* than the NAACP, *Meese*, 615 F. Supp., at 201, so that organization sought an order

> "enjoining the Attorney General and his subordinates from reopening, causing to be reopened, or consenting to the reopening of any decree in an action brought by the government under Title VII of the Civil Rights Act of 1964, as amended, on the basis that such decree contains goals, timetables, numerical remedies, or other relief for persons not

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4. Three other District Courts have issued such injunctions on the same point. One has been reversed outright. *Booth* v. *Maryland*, 112 F. 3d 139, 146 (CA4 1997) (Eleventh Amendment). One case has been resolved without addressing the injunction, *Death Row Prisoners of Pennsylvania* v. *Ridge*, 106 F. 3d 35, 36 (CA3 1997) (noting Eleventh Amendment problem; Commonwealth's statement that Pennsylvania does not qualify is sufficient for underlying action to be "resolved and terminated"), thus implying that the injunction was unnecessary. The third is still pending. *Hill* v. *Butterworth*, 941 F. Supp. 1129 (ND Fla. 1996), appeal pending.

proven to be 'actual victims' of discrimination . . . ." *Ibid.* (footnotes omitted).

The wisdom, restraint, and discretion exercised by Judge Greene in *NAACP* v. *Meese* stands in sharp contrast to the attitude displayed by the District Court and the Court of Appeals majority in the present case.

> "[T]wo fundamental principles of law so clearly stand as obstacles to the grant of relief by the Court that none of the other issues is open for consideration. Plaintiff's action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States." *Id.*, at 202.

On the first point, Judge Greene noted that any attempt by the judiciary to dictate what positions the executive could present to the courts would be an interference with a duty expressly assigned by the Constitution to the executive branch, to "take Care that the Laws be faithfully executed." *Ibid.* (quoting U. S. Const., Art. II, § 3; *United States* v. *Mendoza*, 464 U. S. 154, 161 (1984); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976)).

Defendants in the present case have substantially the same constitutional duty. Cal. Const., Art. V, §§ 1, 13. The structural concerns are even greater in the present case, because the interference breaches both the judicial/executive boundary and the federal/state boundary. See *Rizzo* v. *Goode*, 423 U. S. 362, 378-379 (1976).

The second reason for denying injunctive relief in *NAACP* v. *Meese* was that "[a]ny such order would, of course, directly affect the course of the litigation in [other] courts, and it would, indeed, interfere directly with their jurisdiction over the lawsuits." 615 F. Supp., at 204. Principles of comity and the availability of relief in the other court required denial of the requested injunction. *Id.*, at 205.

> "One of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien. To close that door to the Attorney General by prohibiting him from filing in any federal court of

> the land pleadings expressive of the position of the Executive Branch with respect to Title VII lawsuits in which that Branch has a legal interest would be an extraordinary step indeed.
>
> "Not only is there no precedent in any of the decided cases for such an invasion by a district court into the Executive's prosecutorial discretion—or for the resulting interference with the authority of other federal courts to deal with litigation pending before them as they see fit—but basic jurisprudential principles affirmatively prohibit such an action. It may well be that plaintiffs are correct in their interpretation of *Stotts*, but the Supreme Court's opinion in that case is sufficiently Delphic that a contrary construction cannot with certainty be ruled out." *Id.*, at 205-206 (footnotes omitted).

The statute at issue in the present case could also be described as "Delphic," or in even less charitable terms. See *Lindh* v. *Murphy*, 138 L. Ed. 2d 481, 494, 117 S. Ct. 2059, 2068 (1997). The terms for states to qualify for Chapter 154 are well within the bounds of reasonable disagreement among lawyers and judges. The fact that Congress took care to include an express retroactivity clause in Chapter 154, see *id.*, at 488-489, 117 S. Ct., at 2063, indicates that Congress thought some states would qualify based on existing systems, and if California does not it is difficult to see that any state does.

Although no opinion of this Court comes as close to the present case as *NAACP* v. *Meese*, *supra*, the elements of that decision can be found in numerous cases. These cases establish that a court of equity should generally refrain from interfering with either the discretionary acts of the executive or with the progress of a case properly before another court.

B. Interference with Executive Discretion.

The reluctance of courts of equity to interfere with discretionary acts of the executive goes back to the earliest cases. In *Marbury* v. *Madison*, 1 Cranch 137, 170-171 (1803), Chief Justice Marshall noted that the writ of mandamus would not lie if the act sought was discretionary with the executive officer. In this sense, mandamus and injunction are "somewhat correlative," *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 (1876), and the same rule applies.

> "Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 527. The rule has been characterized as an 'important' one, to be 'very strictly observed.' 272 U. S., at 527, 529." *Hawks* v. *Hamill*, 288 U. S. 52, 60 (1933).

Indeed, even *Ex parte Young*, 209 U. S. 123 (1908) reiterated the long-standing rule on the impropriety of restraining discretionary executive acts. *Id.*, at 158-159. To justify an injunction in the case before it, *Young* held that there is no discretion to enforce a statute which is unconstitutional and void. *Ibid.* The present case, by contrast, involves a statute which is clearly constitutional, and the only issue is its interpretation. The decision as to which good-faith arguments to present to courts of law goes to the very core of the discretionary responsibility of the state's chief attorney.

Even within a unitary system, courts should avoid interference with a decision vested in the executive branch. *Rizzo* v. *Goode*, 423 U. S. 362, 378-379 (1976). When the interference crosses the federal/state line, this principle applies with even greater force. *Id.*, at 379. This principle was ignored in the present case.

C. Interference with Other Courts.

Most of the cases on interference with other courts deal with federal injunctions against state court proceedings. This is probably the result of the relative frequency of the requests for such relief. Few litigants are motivated to ask one federal court to enjoin proceedings in another. Even so, the *Younger* v. *Harris*, 401 U. S. 37 (1971) line of cases sheds light on the present problem, because that doctrine is based on general principles of equity as well as federalism.

The general rule of equity is an old one. "There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding." *Wilson*

v. *Lambert*, 168 U. S. 611, 618 (1898). The *Younger* line is based on this principle, as well as on federal/state comity. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619, 627 (1986). It is not limited to criminal proceedings. *Ibid.*

The District Court in the present case acknowledged that its "decision may constrain the ability of other co-equal district court judges to decide the issue differently." *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1068, App. to Pet. for Cert. 59a-60a (ND Cal. 1997). Yet it considered this question only under the discussion of declaratory relief and class certification and did not reconsider it when discussing the vastly greater intrusion of injunction. Cf. *id.*, at 1075-1076, App. to Pet. for Cert. 77a-78a. That is where the true interference lies, and that is where centuries-old principles of equity caution restraint. Instead of correcting this error, the Court of Appeals brushed off the declaratory relief/injunction distinction in two sentences. App. to Pet. for Cert. 20a.

D. Steffel v. Thompson.

In deciding that the plaintiffs had stated a cause of action, the District Court relied heavily on *Steffel* v. *Thompson*, 415 U. S. 452 (1974). *Ashmus*, 935 F. Supp., at 1062-1063, App. to Pet. for Cert. 44a-48a. On the question of whether an injunction is proper, however, *Steffel* points in exactly the opposite direction. The essence of that case is that declaratory relief, and not injunction, is the preferred way to resolve these kinds of uncertainties in the law.

Tracing the history of the Declaratory Judgment Act, *Steffel* found that "Congress plainly intended declaratory relief to act as an *alternative* to the strong medicine of the injunction . . . ." 415 U. S., at 466 (emphasis added). *Steffel* also relied on the earlier decision in *Zwickler* v. *Koota*, 389 U. S. 241, 254 (1967), which held that it was "error" to consider the two forms of relief "as a single question." *Steffel*, 415 U. S., at 468. Such an approach "would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate." *Id.*, at 471.

The present case is the converse of *Steffel*. Both courts below found that declaratory relief was appropriate and then blithely tagged on an unprecedented, massively intrusive injunction without pausing to consider the weighty prudential consider-

ations that ought to go into such a decision. Under *Steffel*, this is error.

III. Injunctive relief in the present case was neither necessary nor sufficient to resolve the underlying uncertainty.

The principal requirement for a preliminary injunction, as distinct from other forms of relief, is a showing of irreparable injury. See *Steffel* v. *Thompson*, 415 U. S. 452, 471-472 (1974). Naturally, the injury must be one that the injunction is capable of preventing, or else there would be no point in issuing it. An injunction should only issue, then, when it is both necessary and effective. In the present case it is neither.

A. Unnecessary Intrusion.

In part II, we described how this injunction is a massive intrusion on the constitutional responsibilities of state officers. In this part, we will explain why it was unnecessary.

The Antiterrorism and Effective Death Penalty Act contains two limitations on the filing of habeas corpus petitions. New subdivision (d) of 28 U. S. C. § 2244 provides:

> "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> "(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> "(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

For states qualifying for chapter 154, new section 2263 provides this limitation:

> "(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> "(b) The time requirements established by subsection (a) shall be tolled—
>
> "(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> "(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> "(3) during an additional period not to exceed 30 days, if—
>
> "(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

> "(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

In addition to the length, six months versus a year, the limitations differ in their treatment of the time to petition for certiorari. In section 2263(a), the clock starts on final affirmance in state court, but then is tolled under subdivision (b)(1) when the certiorari petition is actually filed. A petitioner who used his full 90 days to prepare the certiorari petition would have used half of his 180 days. Of course, since certiorari is not part of the exhaustion requirement, *Stone* v. *Powell*, 428 U. S. 465, 495, n. 38 (1976), there is no reason the certiorari and habeas petitions cannot be prepared at the same time.

Section 2244(d)(1)(A) starts the clock at the conclusion of "direct review" without specifying the state court decision. This omission, plus the reference to the judgment becoming final, appears to be an adoption of the rule for *Teague* finality, *i.e.*, denial of certiorari by this Court or the expiration of time to seek it. Cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 390-391 (1994). Thus, the noncapital petitioner, or the capital petitioner in a nonqualifying state, could have up to nine months longer to file his petition.[5]

Congress had a good reason for creating different rules. Habeas petitioners have no constitutional right to counsel in state habeas, not even in capital cases. *Coleman* v. *Thompson*, 501 U. S. 722, 756-757 (1991). Chapter 154 only applies to inmates who have been provided counsel on state habeas. The fact that the petitioner has already had one attorney-prepared habeas petition makes an enormous difference in preparing the second.

In a traditional post-conviction review system, where habeas follows direct appeal and where a different attorney must be appointed for that procedure, see 28 U. S. C. § 2261(d), an unrepresented inmate's time under section 2263 could conceivably be running while he awaited appointment of state habeas counsel.

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5. The difference will be smaller if a state habeas petition is pending during all or part of the gap between the decision on direct appeal and the filing of the certiorari petition. See 28 U. S. C. § 2263(b)(2) (tolling during pendency of state habeas).

That possibility need not concern the Court in this case, however, as California seeks only to qualify under "unitary review."

As the District Court recognized, a system of "unitary review" does not necessarily mean a single consolidated proceeding. Under California's present system, state habeas is conducted during the pendency of the direct appeal, and this is sufficient to constitute "unitary review" within the meaning of 28 U. S. C. § 2265. *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1070, App. to Pet. for Cert. 65a (ND Cal. 1997). The attorney appointed to represent the defendant on direct appeal is also responsible for the habeas petition, and it is due 90 days after completion of the appellate briefing. See California Supreme Court Policies Regarding Cases Arising from Judgments of Death, App. to Pet. for Cert. 94a.

Under this system, then, *every* death row inmate has an attorney appointed to represent him on state habeas before the clock ever begins to run under 28 U. S. C. § 2263. If the attorney files the petition within the required time, again before the clock begins, the clock will not start until the California Supreme Court has decided that petition.

The injury cited by the Court of Appeals is the possibility of an unrepresented petitioner being forced to file a "bare bones" petition in order to meet the limitation period of section 2263.[6] App. to Pet. for Cert. 10a. This statement overlooks the fact that federal habeas for California capital prisoners reviews *fully completed litigation*. Before the clock ever starts, petitioner has already had state habeas and appellate counsel appointed. He has already had an opportunity to present every cognizable claim to a competent court. He has already had a decision on them. The claims are set forth in the state pleadings and need only be recast into the form of a federal petition. Six months is more than enough time for the federal court to appoint counsel and for that counsel to file a meaty petition, not a "bare bones" one.

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6. This statement appears in the Eleventh Amendment analysis. The court's two-sentence discussion of propriety of injunctive relief makes no mention of the irreparable injury requirement. See App. to Pet. for Cert. 14a.

If, for any reason, counsel could not be appointed within six months, reasonable accommodation for an indigent, unrepresented petitioner would seem to allow him to simply attach the state pleadings and assert all federal claims in them. Claims omitted from the appeal and first state habeas are generally procedurally barred. See *In re Clark*, 5 Cal. 4th 750, 765, 770, 855 P. 2d 729, 738 (1993); *Deere* v. *Calderon*, 890 F. Supp. 893, 895 (CD Cal. 1995) (*Clark* rule is enforceable bar).[7] The few additional claims, if any, that would be cognizable on federal habeas can be added by amendment to the petition.

The Court of Appeals noted that 28 U. S. C. § 2266(b)(3)(B) in Chapter 154 limits amendments to the petition, and that a District Court which holds that California qualifies for Chapter 154 might not allow amendment. App. to Pet. for Cert. 16a. Such a decision, if erroneous, is not irreparable. If the ultimate decision is that California does not qualify, a holding under Chapter 154 would be reversed. If the ultimate resolution is that California does qualify, the petitioner has not lost anything to which he was entitled.

Thus, even if the Attorney General's so-called "threats" were the source of uncertainty, the danger of irremediable injury flowing from that uncertainty is exaggerated in the opinions below. The massive, unprecedented intrusion of the injunction issued in this case was unnecessary and hence improper.

B. An Ineffective Solution.

The uncertainty in this case does not spring from any assertions by the state officials. The uncertainty comes from the law itself. The preliminary injunction issued in this case, therefore, does nothing to resolve the underlying question.

If the state qualifies for Chapter 154 of Title 28, then the habeas petition must be filed within 180 days, unless the criteria

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7. There is contrary (and, *amicus* believes, wrongly decided) Ninth Circuit authority for pre-*Clark* cases. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1393 (1996), cert. denied 136 L. Ed. 2d 391, 117 S. Ct. 500 (1996). Most, if not all, such cases have since met or defaulted the one-year limitation of 28 U. S. C. § 2244(d). There is clearly no need for injunctive relief in such cases, since the "gap" period where section 2263 makes a difference is already past.

for successive petitions are met. 28 U. S. C. §§ 2263, 2262(b)(1), 2262(c). This rule is undeniably mandatory. By declaring that "no Federal court thereafter shall have the *authority* to enter a stay of execution," *id.*, at § 2262(c) (emphasis added), Congress has made clear that these limits are jurisdictional.

A preliminary injunction, even when affirmed on appeal, is not res judicata. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4009, p. 157 (2d ed. 1996). Even a "permanent" injunction can be lifted if the precedent on which it is based "is no longer good law." *Agostini* v. *Felton*, 138 L. Ed. 2d 391, 410, 117 S. Ct. 1997, 2016 (1997). Notwithstanding the injunction issued in this case, then, if this Court or the Ninth Circuit en banc should later decide that California does qualify for Chapter 154, all pending petitions filed out of time would have to be dismissed, unless they qualify for an exception.

Petitioners in such cases might argue that the state had defaulted the limitation defense by not raising it in the answers to their respective petitions. A more egregious denial of due process of law could scarcely be imagined than to enjoin a party from asserting a valid defense and then declare him in default for obeying the injunction. The people, as well as the defendant, are entitled to due process of law. *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other grounds in *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964).

If California does, in reality, qualify, then it has a right granted by Congress to have the issues joined within 180 days. For a court to strip the state of its Congressionally conferred rights through a forced default would raise grave questions of separation of powers. The state must be permitted to assert its valid defense at the first opportunity.

The uncertainty can only be resolved by a final judgment. If the Fourth Circuit is right, the issue must be resolved within a habeas proceeding. *Booth* v. *Maryland*, 112 F. 3d 139, 145-146 (CA4 1997), cert. pending No. 97-5623. Federal courts can issue declaratory judgments in cases within their jurisdiction. 28 U. S. C. § 2201.

Unlike a preliminary injunction, a declaratory judgment gives relief only when it is final. *Doran* v. *Salem Inn, Inc.*, 422 U. S.

922, 931 (1975). In the context of the present case, though, the interim relief of the injunction is illusory. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 214 (1995) (new precedent on statute of limitation resulted in dismissal of pending cases).

The declaratory relief portion of the District Court's decision is not before this Court. The Court of Appeals held it had no jurisdiction over that aspect of the case, because it was not yet final. App. to Pet. for Cert. 8a.[8] Petitioners have not challenged that holding. The only issues, then, are the jurisdiction to issue the injunctions and the propriety of issuing it. The injunction in this case was unprecedented, intrusive, unnecessary, ineffective, and improper. Its issuance was a gross abuse of discretion, calling for an exercise of this Court's supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

November, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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8. To expedite resolution of this issue, the District Court could certify it for appeal. 28 U. S. C. § 1292(b).

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Supreme Court, U.S.
FILED
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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1997
CERTIORARI GRANTED DECEMBER 5, 1997

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*These items, which appear in the Appendix to the Petition for Writ of Certiorari (Pet. App.) at the pages indicated, are omitted from this Joint Appendix pursuant to Rule 26.1.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Apr. 24, 1996—Plaintiff Ashmus's complaint filed in U.S. District Court for the Northern District of California

Apr. 26, 1996—Order entered directing defendants to show cause

May 3, 1996—Temporary restraining order entered

May 14, 1996—TRO orally extended 10 days

May 15, 1996—Written Order entered extending and modifying TRO

May 24, 1996—Order entered granting plaintiff's requests for provisional class certification, for declaratory relief, for preliminary injunctive relief, and for *in forma pauperis* status, and denying defendants' motion to dismiss

May 31, 1996—Defendants' answer filed

June 14, 1996—Opinion of the District Court filed

June 17, 1996—Defendants' notice of appeal filed

August 18, 1996—Opinion of the Court of Appeals for the Ninth Circuit filed

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[FILED APR. 24, 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, Plaintiffs, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, TEENA FARMON, Warden of the Central California Women's Facility, JAMES GOMEZ, Director, California Department of Corrections, and DANIEL LUNGREN, Attorney General of the State of California, Defendants.	Case No. [C 96-1533 TEH] **CLASS ACTION** **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CIVIL RIGHTS)**

Plaintiffs allege as follows:

INTRODUCTION

1. This is an action, brought pursuant to 42 U.S.C.

§ 1983, for declaratory judgment and injunctive relief, challenging the application to federal habeas corpus proceedings involving California death judgments of certain provisions contained in the "Antiterrorism and Effective Death Penalty Act of 1996," P.L. _____ (hereafter "1996 Act"). The 1996 Act -- which President Clinton signed into law on April 24, 1996 -- contains several amendments to the current habeas corpus provisions in Chapter 153 of the Judicial Code (Title 28) and creates a new Chapter 154 to Title 28, which is entitled "Special Habeas Corpus Procedures in Capital Cases." Chapter 154 provides a system of expedited review and other procedural benefits to States that "opt in" by creating a mechanism for appointing and funding competent counsel to represent condemned prisoners in state post-conviction proceedings. 28 U.S.C. §§ 2261-2266. Plaintiff Ashmus and members of the plaintiff class in this action are individuals currently under sentence of death by the State of California who seek a judicial determination that the State of California does not qualify as an opt-in jurisdiction under Chapter 154.

2. Defendants and their agents have indicated their intention to invoke the provisions in Chapter 154 in all current and future federal habeas corpus proceedings involving California death judgments. The provisions defendants seek to invoke include a six-month statute of limitations for the filing of a petition for writ of habeas corpus, 28 U.S.C. § 2263, restrictions on the federal court's review of substantive constitutional claims, 28 U.S.C. § 2264(b), limitations on the ability to amend habeas corpus petitions, 28 U.S.C. § 2264(b), and severe time constraints on federal court consideration of habeas corpus petitions, 28 U.S.C. § 2266, including but not limited to the requirement that District Courts render final judgments within 180 days of the filing of a petition for writ of habeas corpus in a death penalty case.

3. Contrary to defendant's assertions and threats to invoke Chapter 154, the State of California does not currently provide, and has not previously provided, "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by prisoners whose capital convictions and sentences have been upheld on direct appeal" as provided for in 28 U.S.C. § 2261, or a similar mechanism for indigent prisoners in unitary review proceedings, as defined by 28 U.S.C. § 2265. Indeed, the State of California does not provide, nor has it ever provided, a "State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack" as provided in 28 U.S.C. § 2265.

4. Defendants' threats to invoke Chapter 154 deny plaintiffs their federal rights to redress constitutional violations and create the unacceptable and unlawful situation that death row inmates are forced to litigate state and federal challenges to their convictions and death sentences without knowing whether Chapter 154 properly applies to their federal habeas proceedings. Resolving this fundamental question is essential to ensure that plaintiffs do not unknowingly forfeit vindication of their statutory and constitutional rights. Without a judicial determination of the rights and responsibilities of the parties to this action, state prisoners sentenced to death in California who have meritorious grounds for challenging their conviction and sentence will be left to hazard a guess as to whether, and how, the new legislation affects their ability to seek redress in the federal courts for deprivations of their constitutional rights.

5. Such uncertainty about the application of Chapter 154 is unconscionable given the consequences of

misjudgment and misinterpretation of the controlling law. Without guidance from this Court, state prisoners in federal court challenging their California death sentences must guess whether they have six months to file a petition for writ for habeas corpus, whether they are able to amend any petition that is filed, whether the federal court reviewing their petition will apply a substantive standard that ensures protection of constitutional rights, and whether the additional restrictive procedures contained in Chapter 154 will apply. Without guidance from this Court, death row prisoners not currently in federal court are unable to determine whether they are entitled to the appointment of competent counsel and reasonable litigation expenses envisioned by 28 U.S.C. § 2261, whether the time period for filing any federal petition has already begun to run, or whether they must undertake steps in either state or federal courts to protect their right to review of their constitutional challenges to their convictions and death sentences.

6. Prosecution of this action as a class action is essential to ensure uniform and timely notice of the applicability of the new statute and to permit the fair and orderly resolution of the rights and responsibilities of all parties.

7. A prompt determination of whether the defendants may properly invoke Chapter 154 is also critical for the effective functioning of the federal judiciary. If Chapter 154 applies, federal district courts may be required to adjust their non-capital dockets to resolve federal habeas corpus actions involving capital cases on an expedited basis, as required by 28 U.S.C. § 2266.

JURISDICTION

8. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, as it arises under the Constitution and laws of the United States.

9. This Court also has jurisdiction over this case pursuant to 28 U.S.C. § 1343(a)(3) and (4), as plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States, and under an Act of Congress providing for equal rights of persons within the jurisdiction of the United States, and because it seeks equitable or other relief under an Act of Congress providing for the protection of Civil Rights.

10. This Court is empowered to declare the rights and other legal relations of the parties herein, by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means, by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdiction. This Court is entitled to order injunctive relief under 42 U.S.C. § 1983, as this action involves the deprivation of constitutional rights by defendants acting under color of state law.

11. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b).

INTRADISTRICT ASSIGNMENT

12. This action arises within the counties assigned to the San Francisco Headquarters and the Oakland Division of this District. Plaintiff and virtually all other members of the plaintiff class and defendant Arthur Calderon reside in Marin County, California.

PARTIES

13. Plaintiff, Troy A. Ashmus, is a resident of the Northern District of California, incarcerated at San Quentin Prison under sentence of death.

A. On July 25, 1986, the Superior Court in and for the County of San Mateo entered judgment of conviction and death sentence against Mr. Ashmus.

B. On March 4, 1987, the California Supreme Court appointed Linda F. Robertson to represent Mr. Ashmus in his automatic appeal of his conviction and death sentence. The order appointing Ms. Robertson read as follows:

> Upon request of appellant for appointment of counsel, Linda F. Robertson, Esq. is hereby appointed to represent appellant on his automatic appeal now pending in this court.

C. On January 29, 1992, the California Supreme Court affirmed Mr. Ashmus's convictions and death sentence when it denied his timely petition for rehearing of the Court's published decision in *People v. Ashmus*, 54 Cal.3d 932, 2 Cal. Rptr.2d 112 (1991).

D. The United States Supreme Court denied Mr. Ashmus's timely Petition for Writ of Certiorari on October 5, 1992. *Ashmus v. California*, 506 U.S. 841, 113 S. Ct. 124 (1992).

E. On February 17, 1993, Mr. Ashmus instituted federal proceedings challenging his conviction and death sentence by filing an Application for Appointment of Counsel and a Request for Stay of Execution in *Ashmus v. Calderon*, No. C-93-0594-TEH. Mr. Ashmus's federal proceedings are currently pending

before the Honorable Chief Judge Thelton E. Henderson.

F. In December 1993, this Court appointed Bernard Zimmerman and Grace Suarez to represent Mr. Ashmus in his federal habeas corpus proceeding. Mr. Zimmerman subsequently was appointed as a United States Magistrate, and this Court permitted counsel to withdraw from their representation of Mr. Ashmus.

G. On August 9, 1995, this Court issued an order appointing Michael Laurence and Jeannie R. Sternberg to represent Mr. Ashmus in his federal habeas corpus proceeding.

H. On December 4, 1995, this Court filed an order extending the stay of execution of Mr. Ashmus's death sentence to and including August 2, 1996, to permit current counsel for Mr. Ashmus to prepare, file, and serve a Petition for Writ of Habeas Corpus.

14. Defendant Arthur Calderon is the Warden of San Quentin Prison. San Quentin Prison houses "death row" for male persons sentenced to death and committed to the jurisdiction of the Department of Corrections and is the location where executions pursuant to California law are carried out. As warden, defendant Calderon is the custodian of all male persons sentenced to death and housed at San Quentin and is the nominal respondent in all federal habeas corpus cases challenging California death sentences of such state prisoners. Defendant Calderon acts under color of state law and is sued in his official capacity.

15. Defendant Teena Farmon is the Warden of the Central California Women's Facility in Chowchilla, California. The Central California Women's Facility houses "death row" for the eight female persons sentenced to death and committed to the jurisdiction of the Department of Corrections. As warden, defendant

Farmon is the custodian of all female persons sentenced to death and housed at the Central California Women's Facility. Defendant Farmon acts under color of state law and is sued in her official capacity.

16. Defendant James Gomez is the Director of the California Department of Corrections. In this capacity and pursuant to California Penal Code Section 5054, defendant Gomez is responsible for the custody of all inmates committed to the jurisdiction of the Department of Corrections. Defendant Gomez acts under color of state law and is sued in his official capacity.

17. Daniel Lungren is the Attorney General of the State of California. As such, he represents the custodians of the state prisoners in all habeas corpus litigation in state and federal courts, as well as in all California direct appeals. Defendant Lungren acts under color of state law and is sued in his official capacity.

CLASS ACTION ALLEGATIONS

18. This action is brought by plaintiff as a class action on his own behalf as an individual and on behalf of himself and others similarly situated, pursuant to the provisions of Federal Rules of Civil Procedure Rules 23(a), 23(b)(1), and 23(b)(2), 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Federal Rules of Civil Procedure Rule 57 and 65, seeking declaratory and injunctive relief and subordinate relief incidental thereto including costs and attorneys' fees.

19. The class so represented by plaintiff in this action and of which plaintiff is himself a member consists of all prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending the resolution of their state and federal challenges to their state convictions and sentences. All members of the plaintiff class have federal constitutional

challenges to advance against their convictions and/or death sentences.

20. The precise number of members of the class is not currently known, but, based on information and belief, it is estimated that the plaintiff class contains at least 439 members. Approximately 125 members are in state court awaiting the appointment of counsel on direct appeal. Approximately two persons are added to the class each month. This number is sufficiently large that joinder of all members is impracticable. The class therefore fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(1).

21. All the questions of law presented by this case are common to all members of the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(2). These questions of law include:

A. Whether Chapter 154 of Title 28, as enacted on April 24, 1996, applies to the plaintiffs to the extent that those provisions define rights or specify procedures that are different from the rights and procedures specified in Chapter 153 of the Judicial Code;

B. Whether the State of California has provided "by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal, and "whether under California law, there exists a" rule of court or statute [which] . . . provide[s] standards of competency for the appointment of such counsel" within the meaning of this statute, 28 U.S.C. § 2261;

C. Whether, if so, the State of California's

systemic failure to appoint and compensate counsel, and pay litigation expenses in state postconviction proceedings bars the defendants from invoking the procedures provided in Chapter 154;

D. Whether the State of California's failure to provide counsel in state post-conviction proceedings who is different from counsel in the direct appeal precludes application of Chapter 154;

E. Whether the State of California's failure to provide a unitary review process as defined by 28 U.S.C. § 2265 precludes application of Chapter 154;

F. Whether the defendants should be required to prove that the State of California has adopted and followed the statutes or rules required by Chapter 154, before invoking the procedural protections of Chapter 154.

22. Many of the questions of fact relevant to this case are common to the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(2). These questions of fact include:

A. Whether defendants have threatened to assert that the procedures governing the filing and adjudication of federal habeas petitions contained in Chapter 154 apply to all or some members of the plaintiff class;

B. Whether the State of California intends to assert that the post-conviction or unitary review procedures of Chapter 154 apply to all or some members of the plaintiff class;

C. Whether, if the State of California has a mechanism complying with 28 U.S.C. §§ 2261 and 2265, the State of California has complied with the specific requirements of such rule for the appointment,

compensation, and competence of counsel and the payment of reasonable litigation expenses; and

D. Whether, if the State of California has a mechanism complying with 28 U.S.C. §§ 2261 and 2265, the State of California has offered counsel to all state prisoners under capital sentence, as evidenced by the entry of an order by court of record appointing counsel, finding that the prisoner has knowingly rejected the offer, or denying the appointment for lack of indigency.

23. The claims of the representative party are typical of the claims of the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(3).

24. The representative party will fairly and adequately protect the interests of the class. Many of the class members have no other means of obtaining representation to protect their rights in this regard. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(4).

25. The attorneys for plaintiffs are experienced and capable of civil rights and capital litigation and have successfully represented claimants in other litigation of this nature.

26. This action is properly maintained as a class action under Federal Rules of Civil Procedure Rule 23(b)(1) inasmuch as the prosecution of separate actions by individual members of the class would create the risk of inconsistent and varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class.

27. This action is also properly maintained as a class action under Federal Rules of Civil Procedure Rule

23(b)(2) inasmuch as the defendants herein have acted, and intend to act, as hereinafter more specifically alleged, on grounds that are applicable to the class, and have by reason of such conduct made appropriate final injunctive relief or corresponding declaratory relief with respect to the entire class, as sought in this action.

FACTS

28. On April 24, 1996, the President signed into law the "Antiterrorism and Effective Death Penalty Act of 1996" (hereafter "1996 Act"). Title I of the 1996 Act, entitled "Habeas Corpus Reform," contains several sections modifying existing habeas corpus procedures in Chapter 153 of the Judicial Code (Title 28). Section 107 of the 1996 Act enacts a new Chapter 154 to Title 28.

29. Chapter 154 contains special procedures for cases involving state prisoners under capital sentences. Title 28 U.S.C. § 2261 provides that the procedures set forth in Chapter 154 are applicable as follows:

> (b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.
>
> (c) Any mechanism for the appointment,

> compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--
>
> > (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
> >
> > (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
> >
> > (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.
>
> (d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

30. Section 2261 of Title 28 is commonly referred to as an opt-in provision.

31. The opt-in provisions contained in section 2261

are made applicable to states that provide a system of "unitary review," defined by 28 U.S.C. § 2265 as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack."

32. In states that have, and comply with, statutes or court or agency rules fulfilling the opt-in provisions of 28 U.S.C. § 2261 or 28 U.S.C. § 2265, indigent capital prisoners are subject to more restrictive federal rules regarding the time limitations and standards for consideration of federal habeas corpus petitions challenging their capital sentences.

33. The State of California has enacted no rule or statute that complies with either 28 U.S.C. § 2261 or 28 U.S.C. § 2265.

34. The State of California has denied to indigent postconviction petitioners in capital cases, including the plaintiff in this case and other members of the plaintiff class, appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings.

35. The State of California has enacted no statute or court or agency rule that provides standards of competency for the appointment of counsel for indigent postconviction petitioners in capital cases.

36. The State of California has enacted no statute or court or agency rule that ensures that "no counsel appointed to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation."

37. In fact, the State of California has appointed counsel who represented indigent prisoners under capital sentences at trial or on direct appeal, to represent the same prisoners in postconviction proceedings, without any express request for continued representation by the prisoner and counsel.

38. The State of California has provided no procedure that authorizes persons under sentence of death to raise in the course of the direct appeal any claims that could be raised on collateral attack. California State law restricts the claims that may be raised in the course of direct review of the judgment to errors appearing on the face of the trial record, and precludes from collateral proceedings any claims that could have been raised on direct review. The State Supreme Court has exclusive jurisdiction over the automatic appeals of death judgments and exercises original jurisdiction over collateral attacks on capital judgments. The State procedures for review of plaintiffs' cases routinely preclude consolidation of the direct review and collateral proceedings, and deny plaintiffs adjudication of their collateral attacks.

39. Although the State of California has not complied with the terms of this statute, defendants have asserted and threatened to assert, directly and/or through their attorneys, that the State of California has so complied and that plaintiffs and members of the plaintiff class will be bound by the restrictive terms of this opt-in statute.

CLAIMS FOR RELIEF

40. The state authorities' threatened future assertion of Chapter 154 opt-in procedural benefits, and the uncertainty of their application to plaintiff and other members of the plaintiff class, is an unlawful and

unconstitutional attempt to coerce plaintiff and other members of the plaintiff class to forgo the benefits of Chapter 153 of the Judicial Code, and the complete and orderly litigation of their habeas corpus claims, to which they are otherwise entitled. The actions of defendants as alleged above violate plaintiffs' rights under federal law by denying plaintiff and other members of the plaintiff class effective and sufficient access to vindication of federal constitutional violations through the provisions contained in Chapter 153 of the Judicial Code.

41. Plaintiff and other members of the plaintiff class therefore are in jeopardy of suffering an unlawful suspension or restriction of their right to apply for federal habeas corpus relief, without receiving the countervailing protection of the state statutes or court rules required by 28 U.S.C. § 2261 and 2265.

42. Plaintiff and other members of the plaintiff class are entitled to a determination of the applicability of Chapter 154 in order for them to seek redress and effectuate their rights in state and federal proceedings challenging their convictions and death sentences.

43. There is an actual controversy between plaintiffs and defendants with regard to plaintiffs' claims, thereby rendering appropriate a declaratory judgment pursuant to 28 U.S.C. § 2201.

44. Plaintiff and members of the plaintiff class have no adequate remedy at law for these infringements of their rights. Plaintiff and members of the plaintiff class will suffer irreparable injury unless appropriate redress is provided by the Court.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for all relief that is allowable under the applicable law and is just, including:

45. An order declaring that Chapter 154 of Title 28 is inapplicable to plaintiff and other members of the plaintiff class until and unless defendants demonstrate that the State of California has complied with the requirements of the opt-in provisions;

46. A declaratory judgment declaring that the State of California has not complied with the opt-in provisions of Chapter 154;

47. A declaratory judgment declaring that the provisions of Chapter 154 are not applicable to plaintiff's and other plaintiff class members' federal habeas corpus proceedings;

48. Preliminary and permanent injunction enjoining the defendants from invoking or asserting, in any state or federal proceeding, that the State of California has complied with the provisions of Chapter 154, until such compliance is demonstrated to this Court;

49. Plaintiffs' costs, disbursements, and attorneys fees pursuant to 28 U.S.C. § 1915 and 42 U.S.C. § 1988; and

50. Such further relief as the Court shall find to be just and equitable.

DATED: April 24, 1996. STERNBERG, SOWARDS & LAURENCE

BY: /s/ Michael Laurence
MICHAEL LAURENCE
Sternberg, Sowards & Laurence
Attorneys for Plaintiffs

[SERVICE DOCUMENTATION OMITTED]

[FILED APR. 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v,	)	SCHEDULING ORDER
	)	
ARTHUR CALDERON, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

The Court is in receipt of plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," in the above-captioned case. Good cause appearing, defendants are hereby ORDERED TO SHOW CAUSE at 3:00 p.m., on Thursday, May 2, 1996, in Courtroom 12, located at 450 Golden Gate Avenue, San Francisco, why plaintiffs application for a temporary restraining order and/or temporary declaratory relief should not be granted. Defendant's opposition to the application must be filed and served on plaintiff's counsel no later than 10:00 a.m. on Monday, April 29, 1996.

IT IS SO ORDERED.

DATED 4/26/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v,	)	TEMPORARY
	)	RESTRAINING
ARTHUR CALDERON,	)	ORDER
et al.,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief." On May 2, 1996, the Court held a show cause hearing, having previously ordered defendants to respond. At the close of the hearing, having carefully considered the parties oral and written arguments, and good cause appearing, the Court granted plaintiff's application for a temporary restraining order. This order briefly sets forth the reasons for and scope of that ruling.

Plaintiff-applicant is a prisoner who has been sentenced to death by the State of California and who is challenging his conviction and sentence in federal habeas corpus proceedings pending before the Court. Plaintiff contends that the State of California has failed to comply with the so-called "opt-in" provisions of 28 U.S.C. §§ 2261 and 2265, as added to Title 28 of the United States Code

by the Antiterrorism and Effective Death Penalty Act of 1996 ("Act"). Accordingly, plaintiff contends, the expedited review and other provisions of the newly created chapter 154 of Title 28 do not, and cannot, apply to cases brought under 28 U.S.C. § 2254 by prisoners challenging California judgements of death. Pending final resolution of plaintiff's rights and other legal obligations pursuant to the Act, plaintiff seeks a temporary order (1) enjoining defendants from asserting that the State of California has complied with, or is entitled to the benefits of, the provisions of Chapter 154 in any state or federal proceeding; and (2) declaring that the provisions of Chapter 154 are inapplicable to prisoners under a sentence of death imposed by the State of California.

Plaintiff further contends that the urgency and necessity of this action stem from the uncertainty whether Chapter 154 applies and the gravity of the harm that threatens the plaintiff and other members of the proposed plaintiff class as a consequence of noncompliance. Without a judicial determination of the rights and responsibilities of the parties to this action, plaintiff argues, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.

Based on the foregoing considerations, as well as the parties' papers and oral arguments, the Court finds

that plaintiff-applicant has shown that the applicability of Chapter 154 presents a serious question of law as to which he has demonstrated a significant likelihood that he and other members of the proposed class will prevail on the merits, that he and other members of the proposed class will suffer immediate irreparable injury should this order not issue, and that the balance of hardships tips sharply in their favor. Plaintiffs are accordingly entitled to temporary relief.

Accordingly, Defendants Calderon, Farmon, Gomez, and Lungren are hereby ORDERED TO SHOW CAUSE at 3:00 p.m. on May 13, 1996, or as soon thereafter as counsel may be heard in Courtroom 12, located at 450 Golden Gate Avenue, San Francisco, why you, your agents, servants, employees, and attorneys and those in active concert or participation with you or them, should not be restrained and enjoined pending trial of this action from asserting that the State of California has complied with the provisions of new Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under a sentence of death imposed by the State of California.

Pending hearing on and this Court's disposition of the above Order to Show Cause, you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from asserting that the State of California has complied with or is entitled to the benefits of the provisions of new Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under sentence of death by the State of California.

The above temporary restraining order is effective immediately without the need for plaintiffs to post a bond or security. Defendants shall file directly with chambers

and personally serve additional papers responding to the issues raised at the May 2 hearing no later than 12:00 noon, on May 7, 1996. Plaintiffs shall file and personally serve their additional papers no later then 4:30 p.m., on Thursday, May 9, 1996.

At the present time, the Court is not persuaded of the availability or propriety of temporary declaratory relief. Accordingly, plaintiff's request for such relief is denied pending the hearing on the preliminary injunction.

IT IS SO ORDERED.

DATED 5/3/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 15, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v.	)	ORDER MODIFYING
	)	& EXTENDING
ARTHUR CALDERON,	)	TEMPORARY
et al.,	)	RESTRAINING
	)	ORDER
Defendants.	)	
	)	

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("Act") to the State of California. Plaintiff seeks preliminary and declaratory relief concerning California's eligibility for the procedures potentially available to states under the newly created Chapter 154, as added by the Act to Title 28 of the United States Code.

On May 13, 1996, having previously granted plaintiff's application for a Temporary Restraining Order ("TRO"), the Court held a show cause hearing on whether to issue a preliminary injunction. At the close of the hearing, and good cause appearing pursuant to F.R. Civ. P. 65(b), the Court extended the TRO for an additional ten (10) days and announced that it would modify the language in the TRO. This order elaborates on that oral ruling and requests supplemental briefing from the parties on the propriety of granting final declaratory relief, in lieu

of issuing a preliminary injunction.

GOOD CAUSE EXTENSION

Pursuant to Federal Rule of Civil Procedure 65(b), the Court may, "for good cause shown," extend a TRO for a period "not to exceed 10 days." The reasons for the extension must be "entered of record." FRCP 65(b). As the parties to this action have repeatedly emphasized, resolution of this case literally may have life or death consequences for plaintiff and members of the proposed class; it also raises important questions of finality in capital cases that are of paramount concern to the State of California. The Court's decision may affect the course of federal habeas litigation for every inmate on death row in California. In light of these concerns, and given the complexity, novelty, and number of jurisdictional and statutory construction issues raised by the parties, the Court has concluded that an additional ten (10) days is necessary for it to reach a carefully considered decision in this case.

The Court is acutely aware of the urgency to the State of a prompt and appealable determination on the merits,[1] the potential for duplicative litigation created by the TRO, and the delicate comity and First Amendment issues implicated by its order. As indicated in its May 3, 1996, order, however, the Court believes that plaintiff has demonstrated a strong likelihood of success on the merits and that the balance of hardships tips sharply in plaintiff's favor. The Court also believes that maintaining the TRO in force is the best approach to minimizing duplicative

1. Since the issuance of the TRO, defendants have sought emergency stays from both the Ninth Circuit and the United States Supreme Court, and have applied for an emergency writ of mandamus to the Ninth Circuit. Each of these requests was summarily denied.

litigation over, and ensuring expeditious review of, the applicability of Chapter 154 to California. These factors provide additional reasons for extending the TRO.

MODIFICATION OF THE TRO

In the interim, the TRO shall remain in force, with one exception. Defendants have expressed serious concern regarding the TRO's potential interference with their First Amendment rights. These concerns are sufficiently weighty to warrant a change in the wording of the TRO. Accordingly, the Court hereby strikes from its May 3, 1996, order the following phrase:

> you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from asserting that the State of California has complied with or is entitled to the benefits of the provisions of new Chapter 154 . . .

In place of this wording, the Court hereby ORDERS that the following language be inserted:

> you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 . . .

SUPPLEMENTAL BRIEFING

At the May 13 hearing, both parties appeared to indicate a desire that the Court issue a final declaratory judgment as soon as possible. The parties contended that such a course not only would be the most appropriate and

expeditious way for this case to proceed, but also would potentially avoid the need for the Court to resolve some of the more difficult jurisdictional, equitable, and First Amendment issues the case poses. Federal Rule of Civil Procedure 65(a)(2) appears to provide a possible vehicle for the Court to promptly issue such declaratory relief:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

FRCP 65(a)(2).

Accordingly, the Court hereby ORDERS counsel for plaintiff and defendants each to provide supplemental briefing, not to exceed fifteen (15) pages, on the propriety of the Court consolidating the trial on the merits with the preliminary injunction application. The parties shall file such briefs *directly with chambers* and personally serve them upon opposing counsel on or before Friday, May 17, 1996, at 5:00 p.m. The Court will hear oral argument on the issue at the start of the hearing for provisional class certification, currently scheduled for Thursday, May 23, 1996, at 10 a.m.

Two issues that the Court believes might be appropriately addressed are: (1) how consolidation would affect the need for or propriety of provisional class certification; and (2) whether, if the Court does consolidate the application with the merits, the record is sufficient to allow the Court to evaluate plaintiff's *factual* contentions (i.e., Does California in fact adequately comply with the unitary review procedure allegedly authorized by its comprehensive scheme?). These suggestions are not intended to constrain the parties from

addressing the issues they deem most appropriate.

CONCLUSION

For the reasons discussed above, and good cause appearing, the Court thereby EXTENDS the TRO for an additional ten (10) days, MODIFIES the TRO as indicated, and ORDERS the parties to submit supplemental briefing on the issues and schedule stated above.

IT IS SO ORDERED.

DATED 5/15/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 24, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v.	)	ORDER
	)	
ARTHUR CALDERON, et al.,	)	
	)	
Defendants.	)	
	)	

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("1996 Act") to the State of California. Plaintiff seeks preliminary and declaratory relief concerning California's eligibility for the procedures potentially available to states under the newly created Chapter 154, as added by the 1996 Act to Title 28 of the United States Code. For the reasons discussed below, and good cause appearing, plaintiff's requests for provisional class certification, declaratory relief, preliminary injunctive relief, and to proceed *in forma pauperis* are hereby GRANTED. Defendants' expedited motion to dismiss is hereby DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-applicant is a prisoner who has been sentenced to death by the State of California and who is challenging his conviction and sentence in federal habeas

corpus proceedings pending before the Court. Plaintiff contends that the State of California has failed to comply with the 1996 Act's so-called "opt-in" provisions of 28 U.S.C. §§ 2261 and 2265. Accordingly, plaintiff contends, the expedited review and other provisions of chapter 154 do not, and cannot, apply to petitions brought under 28 U.S.C. § 2254 by prisoners challenging California judgments of death.

In the 30 days since plaintiff filed this action on April 24, 1996, the Court has held three hearings and received six rounds of briefing on the matter. On May 2, at the close of the show cause hearing on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," the Court granted plaintiffs' application for a temporary restraining order ("TRO"). On May 13, at the close of the hearing on plaintiff's application for a preliminary injunction, the Court modified and extended the TRO for an additional ten days. *See Ashmus v. Calderon*, No. C96-1533 TEH (N.D. Cal. May 15, 1996) (Order Modifying and Extending TRO). Yesterday, at the close of the hearing on plaintiff's expedited motion for provisional class certification, defendants' expedited motion to dismiss, and other matters raised in the parties' supplemental briefs, the Court announced that it would be issuing a brief order addressing the outstanding issues presented by the parties. This order fulfills that promise. A more complete explanation of the Court's reasoning will follow, including findings of fact and conclusions of law as required under Fed. R. Civ. Pro. 52(a).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Section 1331 confers jurisdiction upon the Court over "all civil actions arising

under the Constitution, laws, or treaties of the United States." A lawsuit "arises under" federal law if (1) federal law creates the cause of action, or (2) "the resolution of the dispute depends upon the validity, construction, or effect of federal law, so long as the federal question is a real and substantial issue." *City National Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982). Plaintiff seeks a declaratory judgment that Chapter 153, rather than the expedited provisions of Chapter 154, governs federal review of his state court conviction and death sentence. Thus, he has alleged facts sufficient to confer jurisdiction under either prong of this test: The Declaratory Judgment Act creates his cause of action, see *Samuels v. Mackell*, 401 U.S. 66, 70 (1971) (declaratory judgment is "essentially an equitable cause of action"); *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979), and the dispute depends upon the construction and effect of the 1996 Act.

The Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3), because plaintiff has sufficiently alleged a cause of action under 42 U.S.C. § 1983

CLASS CERTIFICATION

After considering the memoranda and exhibits of the parties and the arguments of counsel, the Court finds that this matter meets the requirements of Fed. R. Civ. Pro. 23 and should be provisionally maintáined as a class action. Accordingly, it is hereby ORDERED that, pursuant to Fed. R. Civ. Pro. 23, paragraphs (a), (b)(1), and (b)(2), plaintiffs shall provisionally maintain this matter as a class action on behalf of a class consisting of the following persons:

> All prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending

resolution of their state and federal challenges to their state convictions and sentences.

Plaintiff Troy A. Ashmus shall be the named class representative. The Court shall retain the power to modify, amend, or revoke the class certification throughout the pendency of the action.

DISCUSSION

The urgency and necessity of this action stem from the uncertainty whether Chapter 154 applies and the gravity of the harm that threatens the plaintiff and other members of the provisionally certified class as a consequence of noncompliance. Without a judicial determination of the rights and responsibilities of the parties to this action, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.

California's eligibility to proceed under Chapter 154 literally may have life or death consequences for plaintiff and members of the proposed class; it also raises important questions of finality in capital cases that are of paramount concern to the State of California. The Court's decision may affect the course of federal habeas litigation for every inmate on death row in California. There can be no doubt that this case thus presents an

actual case or controversy, and is of the gravest consequences to the Parties.

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Title I of the Act, entitled "Habeas Corpus Reform," modifies existing habeas corpus procedures contained in Chapter 153 of the Judicial Code (Title 28), and enacts a new Chapter 154, adding §§ 2261-2266 to Title 28. Chapter 154 offers a system of expedited review and other "benefits"[1] to states that qualify under either of two so-called "opt in" procedures: (1) the "post-conviction" procedure provided for in § 2261 or (2) the "unitary review" procedure provided for in § 2265. The Act, which largely codified a 1989 proposal by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,[2] essentially establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review *in return for strengthening* the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 23, 104th Cong., 1st Sess., at 10 ("House

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1. The expedited procedures available to opt-in states include a six-month time limit on the filing of federal habeas corpus petitions, limitations on amendments to petitions and their factual development, and limitations or. federal courts' power to review the merits of constitutional claims and order appropriate relief. 28 U.S. §§ 2263-2264. Moreover, for qualifying states, capital habeas matters must be "given priority by the district court and by the court of appeals over all noncapital matters." § 2266(a).

2. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) ("Powell Committee Report").

Report") (emphasis added).[3]

Defendants concede, and the Court hereby holds, that California does not qualify under § 2261's "post-conviction" procedure. Throughout this litigation, in other cases pending before federal courts in California, and in public statements, however, state officials have consistently and vigorously maintained that California does qualify under § 2265's unitary review procedure. Accordingly, defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class.

> Section 2265(a) provides in full as follows:
>
> For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

3. Although this report was issued in connection with the proposed 1995 Act, the relevant portions of the proposed 1995 Act are identical to the legislation signed into law.

28 U.S.C. § 2265(a).

The threshold question for determining compliance with § 2265 is whether the state has created "a 'unitary review' procedure." If a state has a unitary review procedure, then it qualifies under § 2265 if (1) "the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings," § 2265(a); (2) "The rule of court or statute [] provides standards of competency for appointment of such counsel," *id.*; *and* (3) the State also properly establishes the requisite mechanism for offering and appointing counsel pursuant to § 2265(b). Failure to comply with any of these mandatory requirements is fatal to a state's ability to opt-in under § 2265.

Defendants claim that California satisfies these requirements by virtue of a "comprehensive scheme of interlocking, cross-implementive provisions." The qualifying mechanism, defendants claim, became effective on June 6, 1989, and consists primarily of the following: (1) Cal. Gov't Code § 68511.5 (effective Jan. 1, 1984), (2) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" ("Rules of Court") (effective Jan. 1, 1983), (3) Rule of Court 76.5 (effective Jan. 1, 1985), (4) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective January 1, 1985), (5) the California Supreme Court Statement of Internal Operating Practices and Procedures ("IOPP") (Adopted Summer 1985, Revised December 1989, and in 1995), (6) the California Supreme Court Statement of Policies Regarding Cases Arising From Judgements of Death (the "June 6, 1989 Policies") (adopted June 6, 1989), and (7) *In re Clark*, 21 Cal. Rptr. 2d 509 (1993).

Although the matter is not entirely free from doubt, the Court concludes that California has a unitary review procedure, as that term is defined in the 1996 Act. The Court also concludes, however, that California's alleged comprehensive scheme fails to satisfy the remaining elements of section 2265, for several independent reasons.

First, California has no rule of court or statute that provides standards of competency for appointment of counsel in unitary proceedings. The relevant authority, Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council, is inadequate[4] because (1) it is not a rule of court or statute; (2) does not impose any binding or mandatory standards; and (3) does not require counsel to have any experience or

4. The Act's legislative history indicates that while Congress gave states latitude in establishing the appropriate mechanism and standards, it entrusted to federal courts the responsibility for determining the adequacy of these measures. *See, e.g.,* Powell Committee Report at 3242 ("[I]t is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies . . . The final judgments as to the *adequacy* of any system for the appointment of counsel [], however, rests ultimately with the federal judiciary . . . [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation." (emphasis in original); 137 Cong. Rec. at S3220 (March 13, 1991) (Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991) [hereinafter "1991 Analysis") ("The latitude afforded to the states in defining specific standards of counsel competence is also desirable . . . [However], *[a]t a minimum*, the immediate benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added); *id.* at 3222 (pointing out that proposed § 2261, codified in the 1996 Act as § 2265, "would extend the chapter to states with *adequate* unitary review procedures") (emphasis added).

competence in raising collateral issues.

Second, California's alleged "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" expressly precludes compensation for raising certain collateral issues. *See* June 6, 1989 Policies, Timeliness Standard 1-1; *In re Clark*, 21 Cal. Rptr. 509, 531-32 (1993). This limitation runs afoul of § 2265 (a)'s express requirement that the unitary review procedure authorize and provide compensation for capital defendants to "raise, in the course of direct review of the judgement, *such claims as could be raised* on collateral attack." § 2265(a) (emphasis added). The limitation also creates an objectively deficient standard for the performance of counsel appointed to seek collateral relief. As the Ninth Circuit has noted, the meaningful assistance of counsel in collateral proceedings is important precisely because it is necessary to enable prisoners to "assert *all* possible violations of his constitutional rights" and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation. *Brown v. Vasauez*, 952 F.2d 1164, 1167 (9th Cir. 1991) (emphasis added), *cert. denied*, 503 U.S. 1011 (1992).

Third, California fails to make a bona fide offer of counsel as required by § 2265(b) & 2261(c). By defendants' own admission, "Every inmate who is awaiting appointment of counsel *has* been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defendants' 1st Opp. Mem. at 16 (emphasis in original). The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), as incorporated by § 2265(b), that the state's procedure "must provide for . . . appointment of one or more counsels to represent the prisoner *upon a finding* that the

prisoner is indigent and accepted the offer . . ." (emphasis added); *see also* 1991 Analysis, 137 Cong. Rec. at S3220 (March 13, 1991) ("*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added).

DECLARATORY JUDGMENT

"In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a); *American States Insurance Co. v. Kearns*, 15 F.3 142, 143 (9th Cir. 1994). This case presents an actual controversy that is within the Court's jurisdiction. Accordingly, for the reasons discussed above, and good cause appearing, the Court hereby DECLARES that Chapter 154 of Title 28 of the United States Code does not, at the present time, apply to California, because California has failed to comply with the opt-in provisions of 28 U.S.C. § 2261 or 2265. The Court further declares that the provisions of Chapter 154 are not applicable to the federal habeas corpus proceedings of any members of the provisionally certified class. This declaration shall remain in effect until and unless the State of California demonstrates to this Court that it has complied with the opt-in provisions of 28 U.S.C. 2261 or 2265.

PRELIMINARY INJUNCTION

In the Ninth Circuit, in order to be entitled to preliminary injunctive relief, a plaintiff must show one of the following:

> [E]ither (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor.

EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir. 1991).

Plaintiffs have satisfied both prongs of this test. Prior to issuance of the Court's TRO, defendants' threats to invoke Chapter 154's expedited review provisions were causing plaintiffs to fore-to rights to which they are entitled under Chapter 153. Defendants' assertions during the course of this litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions. While Defendants certainly have a fundamental First Amendment right to express their views in this regard, the Court concludes that the manner in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so.

As a practical matter, defendants' assertions were securing for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that Congress required states to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats were effectively depriving plaintiffs of their rights under chapter 153, and, arguably, under the Due Process Clause as well. Whether, as plaintiffs assert, this effective deprivation constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 appears to be a difficult question of First Impression. However, at the least, plaintiff has raised serious questions in this regard. Given the balance of hardships in this case

and the potential life or death consequences at stake, the Court is obligated to resolve any doubts in plaintiffs' favor and to grant a preliminary injunction.

The Court finds that injunctive relief is necessary and proper to effectuate the terms of its declaratory judgment. Accordingly, the Court harbors no doubt regarding its power to issue injunctive relief. 28 U.S.C. § 2202; *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-32 (1975). Rather, the Court's uncertainty in this regard stems from questions defendants have raised over whether plaintiffs have stated a viable cause of action under 42 U.S.C. § 1983. It is well-settled that, in appropriate circumstances, state officials' threats to assert a legal position can give rise to a cause of action under § 1983. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 683 n. 3 (1977); *Steffel v. Thompson*, 415 U.S. 452, (1974); *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wa. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996). Focussing on the nature of state actions in these cases, defendants have pointed out several reasons why they are distinguishable from the instant case.

The Court recognizes that applying the principles underlying *Steffel* and its progeny to the instant case represents a novel application of these cases. However, the Court believes that defendants have misperceived the relevance of these cases to the instant action. The relevant focus is not the nature of state action,[5] but the nature of the harm that *Steffel* and other courts have held to be cognizable under § 1983. In *Steffel*, the uncertainty

5. Plaintiffs have adequately alleged the presence of state action, as defendants, at one point at least, seemed to concede. *See* Defendants' 2d Opp. Mem. at 4 ("[Plaintiff] observes that state officials 'act under color of state law' when they litigate, a proposition we do not dispute.")

caused by state officials' threats to prosecute plaintiff under an allegedly unconstitutional statute caused plaintiff to forego his First Amendment rights to free speech. In *Thorsted*, the uncertainty created by state officials' threats to enforce an allegedly unconstitutional term limits measure caused plaintiffs to forego rights secured by the First and Fourteenth Amendments, as well as the Qualifications Clause. In the instant case, the uncertainty created by defendants threats is causing plaintiffs to forego their rights, under chapter 153, not to be executed without a federal court's determination that their conviction and sentence does not offend the U.S. Constitution.

Defendants have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, "death is different."

For the foregoing reasons, the Court concludes that it is necessary to convert the TRO into a preliminary injunction. Accordingly, and good cause appearing, defendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under sentence of death by the State of California.

The foregoing discussion compels the conclusion that defendants motion to dismiss must be, and hereby is, DENIED. However, defendants have also requested a temporary stay of the Court's injunctive relief. In deference to the important state interests that defendants have raised, and in light of the undersigned's unavailability next week, the Court believes that a limited stay of the injunction is appropriate. Accordingly, the Court hereby stays this injunction for a period of ten (10) days.

IFP APPLICATION

Plaintiff has requested permission to proceed *in forma pauperis* in the above-captioned case, due to his poverty. The Court has previously permitted Mr. Ashmus to proceed *in forma pauperis* in his pending federal habeas corpus proceedings, *Ashmus v. Calderon*, No C-93-0594. On the basis of his affidavit in that case, the Court will permit Mr. Ashmus to proceed *in forma pauperis* in the instant case, pending submittal of a new affidavit by Mr. Ashmus. Counsel for plaintiff is directed to submit such an affidavit as soon as possible, and in any event, not later than 10 days from the issuance of this order.

CONCLUSION

For the reasons discussed above, and good cause appearing, it is hereby ORDERED that

(1) Plaintiff's request for provisional class certification is GRANTED;

(2) Plaintiff's request for final declaratory relief is GRANTED;

(3) Plaintiff's request for preliminary injunctive relief is GRANTED;

(4) Plaintiff's request to proceed *in forma pauperis* is GRANTED; and

(5) Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

DATED 5/24/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[FILED MAY 31, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al., Plaintiffs, v. **ARTHUR CALDERON, Warden of California State Prison at San Quentin, et al.,** Defendants.	C-96-1533 TEH **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL**

Defendants Arthur Calderon, Teena Farmon,

James Gomez, and Daniel Lungren respond to the complaint filed on April 24, 1996, in this action with the following admissions, denials, and allegations. Except as expressly admitted, defendants deny each and every allegation of the complaint.

FIRST DEFENSE

I.

Defendants admit the allegation of paragraph 1 that plaintiff purports to bring this action pursuant to 42. U.S.C. § 1983 but deny that it is properly brought under that section. Defendants also deny any implicit allegation in paragraph 1 that the case is properly before this Court as a class action or certifiable as such. Defendants admit plaintiff's general recital of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and further admit that he is under sentence of death and "seeks a judicial determination that the State of California does not qualify as an opt-in jurisdiction."

II.

Defendants deny the allegations of paragraph 2; they do not intend "to invoke the provisions in Chapter 154 *in all* current and future federal habeas corpus proceedings involving California judgments."

III.

Defendants deny the allegations of paragraph 3.

IV.

Defendants deny the allegations of paragraph 4.

V.

Defendants deny the allegations of paragraph 5.

VI.

Defendants deny the allegations of paragraph 6.

VII.

Defendants deny the allegations of paragraph 7.

VIII.

Defendants admit the allegation of paragraph 13 that 28 U.S.C. § 1331 confers jurisdiction over cases arising under the Constitution and laws of the United States but deny that the Court has Article III jurisdiction in this case because of the absence of an actual case or controversy.

IX.

Defendants deny the allegations of paragraph 9.

X.

Defendants admit that the Court is empowered to declare the rights and other legal relations of parties pursuant to 28 U.S.C. § 2201, and to effect appropriate relief under 28 U.S.C. § 2202. Defendants deny that this case involves an actual case or controversy within the Court's jurisdiction, that plaintiff or any alleged class member is entitled to relief under 42 U.S.C. § 1983, or that defendants, while acting under color of state law, have deprived plaintiff or any alleged class member of

constitutional rights.

XI.

Defendants admit the allegation of paragraph 11.

XII.

Defendants admit the allegation of paragraph 12.

XIII.

Defendants admit the allegations of paragraph 13(A), (F), (G), and (H). Defendants admit the remaining allegations of paragraph 13 except as follows: defendants deny any implied allegation of paragraph 13(B) that the appointment of Linda F. Robertson was limited to the automatic appeal; with respect to 13(C), the date of affirmance occurred on December 5, 1991; as to 13(D), although the petition for writ of certiorari was timely filed, it contained untimely claims; as to 13(E), defendants deny that plaintiff's "institut[ion] of federal proceedings" on February 17, 1993, constituted anything more than the invocation of this Court's habeas corpus jurisdiction.

XIV.

Defendants admit the allegations of paragraph 14 except for any allegation, which defendants deny, that Defendant Calderon acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XV.

Defendants admit the allegations of paragraph 15 except for any allegation, which defendants deny, that

Defendant Farmon acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVI.

Defendants admit the allegations of paragraph 16 except for any allegation, which defendants deny, that Defendant Gomez acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVII.

Defendants admit the allegations of paragraph 17 except for any allegation, which defendants deny, that Defendant Lungren acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVIII.

Defendants admit the allegation of paragraph 18 that plaintiff purports to bring a class action pursuant to 42. U.S.C. §§ 1983, 28 U.S.C. § 2201, and Rules 23, 57, and 65 of the Rules of Civil Procedure, but deny that he does so properly or that he is entitled to relief or class certification on any basis.

XIX.

Defendants deny the allegations of paragraph 19.

XX.

Defendants deny the allegations of paragraph 20 that a proper class exists for purposes of a class action in this case, and that the number of present and future California inmates awaiting execution makes joinder

impracticable within the meaning of Federal Rule of Civil Procedure 23(a)(1). Defendants admit as fair estimates the allegations of the approximate number of current death row inmates, inmates awaiting appointment of counsel in state court following conviction, and inmates added monthly to death row.

XI.

Defendants deny the allegations of paragraph 21 and its subparts.

XXII.

Defendants deny the allegations of paragraph 22 and its subparts.

XXIII.

Defendants deny the allegations of paragraph 23.

XXIV.

Defendants deny the allegations of paragraph 24.

XXV.

Defendants lack sufficient information to formulate a belief in the truth or falsity of the allegation of paragraph 25, and deny the allegation on that basis.

XXVI.

Defendants deny the allegations of paragraph 26.

XXVII.

Defendants deny the allegations of paragraph 27.

XXVIII.

Defendants admit the allegations of paragraph 28.

XXIX.

Defendants admit the allegation of paragraph 29.

XXX.

Defendants deny that the term "opt-in" as alleged in paragraph 30 is an appropriate characterization.

XXXI.

Defendants deny that the term "opt-in" as alleged in paragraph 31 is an appropriate characterization.

XXXII.

Defendants deny the allegations of paragraph 32 that application of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 depends strictly on whether states "have, and comply with, statutes or court or agency rules." Defendants admit that application of the new provisions of Chapter 154 imposes more restrictive rules and standards to federal habeas corpus petitions by death row inmates challenging their state judgments.

XXXIII.

Defendants deny the allegation of paragraph 33.

XXXIV.

Defendants deny the allegation of paragraph 34.

XXXV.

Defendants deny the allegation of paragraph 35.

XXXVI.

Defendants admit the allegation of paragraph 36.

XXXVII.

Defendants lack sufficient information to formulate a belief in the truth or falsity of the allegation of paragraph 37 as respects appointments before 1977. Defendants deny the allegation as to appointments from 1977 onwards.

XXXVIII.

Defendants admit the allegations of the second and third sentence of paragraph 38 as a generally correct statement of California law, and deny each and every other allegation of paragraph 38.

XXXIX.

Defendants deny the allegations of paragraph 39.

XXXX.

Defendants deny the allegations of paragraph 40.

XXXXI.

Defendants deny the allegation of paragraph 41.

XXXXII.

Defendants deny the allegation of paragraph 42.

XXXXIII.

Defendants deny the allegation of paragraph 43.

XXXXIV.

Defendants deny the allegations of paragraph 44.

XXXXV.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 45.

XXXXVI.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 46.

XXXXVII.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 47.

XXXXVIII.

Defendants deny that plaintiff or any alleged class

member is entitled to the relief requested in paragraph 48.

XXXXIX.

Defendants deny that plaintiff or any alleged class member is entitled to the relief, costs, disbursements, or attorneys fees requested in paragraph 49.

XXXXX.

Defendants deny that plaintiff or any alleged class member has been damaged, injured, or deprived of any federal right justifying relief in equity or law, or is entitled to the relief sought in paragraph 50.

SECOND DEFENSE

XXXXXI.

Defendants allege that the complaint fails to state any claim upon which relief can be granted.

THIRD DEFENSE

XXXXXII.

Defendants allege that the complaint fails to state a claim against each answering defendant.

FOURTH DEFENSE

XXXXXIII.

Defendants deny that they have deprived any person of any right, privilege, or immunity guaranteed by the Constitution or laws of the United States or the State of California, and deny that plaintiff or any alleged class member has been deprived of any such right, privilege, or immunity.

FIFTH DEFENSE

XXXXXIV.

Defendants allege that if they performed any of the acts or omissions alleged in the complaint, at the time of such act or omission they were performing a discretionary function and did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Defendants therefore assert that they are immune from liability.

SIXTH DEFENSE

XXXXXV.

Defendants allege that at the time of the events alleged in the complaint, there were no clearly established federal rights, of which defendants knew or should have known, which required defendants to act differently from the way they did, in fact, act. Defendants therefore allege that they are immune from liability.

SEVENTH DEFENSE

XXXXXVI.

Defendants allege that the relief sought in the complaint is barred by the Eleventh Amendment to the United States Constitution.

EIGHTH DEFENSE

XXXXXVII.

Defendants allege that no imputed liability exists between public officers in actions under the Federal Civil Rights Act.

NINTH DEFENSE

XXXXXVIII.

Defendants allege that no imputed liability exists between a public officer and his or her employing public entity in actions under the Federal Civil Rights Act.

TENTH DEFENSE

XXXXXIX.

Defendants allege that the Court lacks subject matter jurisdiction to consider the claims of the complaint.

ELEVENTH DEFENSE

XXXXXX.

Defendants allege that the Court should abstain

from adjudicating any issue relating to the meaning or application of California law or procedure until the state courts have been given a fair opportunity to address the issue.

TWELFTH DEFENSE

XXXXXXI.

The complaint and each cause of action fail to allege facts sufficient to constitute a cause of action for attorneys fees.

DEMAND FOR JURY TRIAL

Defendants hereby demand a trial before a jury on all issues in the complaint triable to a jury.

WHEREFORE, defendants pray that:

1. Judgment be rendered in favor of defendants and against plaintiff;

2. Plaintiff take nothing by the complaint;

3. Defendants be awarded their costs of suit incurred herein; and

4. Defendants be awarded such other and further relief as the Court may deem necessary and proper.

Dated: May 31, 1996.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

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Chief Assistant Attorney General

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/s/ Morris Beatus
MORRIS BEATUS
Deputy Attorney General

Attorneys for Defendants

[SERVICE DOCUMENTATION OMITTED]

(ORDER LIST: 522 U.S.)

FRIDAY, DECEMBER 5, 1997

CERTIORARI GRANTED

* * * * * * * * * * *

97-391 CALDERON, WARDEN, ET AL. V. ASHMUS, TROY, ETC.

The motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* is granted. The motion of respondent for leave to proceed in *forma pauperis* is granted. The petition for writ of certiorari is granted limited to Questions 1 and 2 presented by the petition. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 16, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 13, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 13, 1998. Rule 29.2 does not apply.

COPY (6)

No. 97-391

JAN 15 1998
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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(CAPITAL CASE)

QUESTIONS PRESENTED

A California death row inmate brought this class action suit against state officials, challenging their view that California's mechanism for appointing and compensating state collateral counsel in capital cases satisfies the criteria established in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Without addressing the Eleventh Amendment, the District Court allowed the suit, concluded that California's mechanism does not qualify under Chapter 154, and issued a statewide injunction barring California officials from contending otherwise in any proceeding involving any class member. Disagreeing with *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), the Ninth Circuit concluded that the inmate's suit was authorized under the *Ex Parte Young* doctrine because it "identif[ied] a continuing or impending violation of federal law" by state officials, and affirmed. The questions presented are:

1. Does the Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in the regular course of habeas litigation?

2. Does an injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute an impermissible viewpoint-specific prior restraint on lawful advocacy?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-391

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1a-24a, is reported at 123 F.3d 1199 (CA9 1997). The opinion of the District Court, Pet. App. 25a-80a, is reported at 935 F. Supp. 1048 (ND Cal. 1996).

JURISDICTION

The Court of Appeals entered its judgment on August 18, 1997. Pet. App. 1a. The petition for a writ of

certiorari was filed on September 5, 1997, and was granted on December 5, 1997. J.A. 58. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Enacted as Title I, section 107, of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 214 (AEDPA), new Chapter 154 of Title 28 institutes adjudicative reforms for federal habeas corpus review of capital judgments from states with qualifying mechanisms for appointing and compensating state collateral counsel. Seeking to block application of those reforms to the federal judiciary's review of California capital judgments, a death row inmate brought this class action against state officials for preemptive declaratory

and injunctive relief. Filed the same day the AEDPA was signed into law and Chapter 154 became effective, the inmate's complaint styled this suit a "civil rights" action "brought pursuant to 42 U.S.C. §1983," and purported to invoke the jurisdiction of the district court under 28 U.S.C. §§1343(a)(3), (4) (civil rights) and 1331 (federal question); equitable relief was sought pursuant to 28 U.S.C. §§1343(a)(3), 2201, and 2202. J.A. 2-3, 6, 18.

Without addressing state officials' claim of Eleventh Amendment immunity from such a suit, the District Court allowed it go forward, concluded that California's collateral review procedures do not include a qualifying mechanism under Chapter 154, and issued a statewide injunction barring state officials from advocating otherwise in any legal proceedings involving death row inmates. Pet. App. 25a-80a. In a 2-1 decision, the Ninth Circuit affirmed, rejecting the Eleventh Amendment immunity claim with a finding that the inmates, by challenging the state's "announced intention" to urge application of Chapter 154 in the federal courts, had "identif[ied] a continuing or impending violation of federal law" by state officials. *Id.*, at 1a, 9a-13a. The Ninth Circuit also rejected state officials' claim that the injunction constituted an impermissible restraint on their right and duty to engage in lawful advocacy on behalf of the state's interests. *Id.*, at 21a. Judge Beezer dissented, having concluded that the suit was barred by the Eleventh Amendment. *Id.*, at 22a-24a.

A. Chapter 154

Chapter 154 implements wide-ranging reforms relating to federal habeas corpus review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy,* 117 S.Ct.

2059, 2063 (1997). More particularly, in order to qualify, a state that authorizes death row inmates to present collateral claims in the course of direct appellate review, see generally 28 U.S.C. §2265(a) ("unitary review"), must "establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" incurred in connection with collateral claims, and such rule of court or statute must "provide standards of competency for the appointment of such counsel"; the state's mechanism must also include an "offer of counsel" (and such counsel must be someone other than the inmate's trial attorney, unless both "expressly request continued representation") and "entry of an order" providing appointment to eligible inmates "upon a finding that the prisoner is indigent and has accepted the offer." See generally 28 U.S.C. §§ 2261, 2265. Congress expressly made Chapter 154 applicable "to cases pending on or after the date of enactment," *i.e.,* April 24, 1996. 110 Stat. 1226.

B. The Parties

Troy A. Ashmus is a California prisoner whose state capital judgment and sentence were affirmed in 1991, *People v. Ashmus*, 54 Cal. 3d 932, 2 Cal. Rptr. 2d 112, 820 P.2d 214 (1991), cert. denied, 506 U.S. 841, reh'g denied, 506 U.S. 1015 (1992). Although he had been provided counsel to pursue state collateral review, he never did so; instead, in 1993, he sought and obtained appointment of counsel to represent him in federal collateral proceedings. See Pet. App. 26a. His death judgment having been effectively stayed since then, Ashmus eventually filed a federal habeas petition in April of 1997 (one year after he initiated this separate civil suit against state officials), but his habeas proceedings are now being held in a state of

indefinite "abeyance" pending the District Court's "identif-[ication]" of unexhausted claims. *Ashmus v. Calderon*, 977 F. Supp. 987, 988 and n. 3, 992 and n. 11, 995 (ND Cal. 1997).

Wardens Calderon and Farmon and Director Terhune are California correctional officials who, having custody of the state's death row population, are typically named as respondents in capital habeas proceedings initiated in federal court. See generally 28 U.S.C. §2254 Rule 2(c) and App.

Attorney General Lungren is the state's chief law officer; it is his constitutional duty to "see that the laws of the state are uniformly and adequately enforced." Cal. Const., art. 5, §13. He is also the state's principal legal counsel, commanded by the legislature to "prosecute and defend all causes to which the State, or any State officer is a party in his official capacity . . . ," including, of course, federal habeas corpus proceedings. Cal. Gov't. Code §§ 12500-12512.

About one year before passage of the AEDPA, Attorney General Lungren testified before the Judiciary Committee of the United States Senate, where he praised Chapter 154 for "accomodat[ing] unitary review states like California where appellate courts can consider concurrently the direct appeal and post-conviction review."[1/] See Record, Doc. Nos. 6-7 (Memorandum in Support of Application for TRO, Temporary Declaratory Relief, and Preliminary Injunctive Relief 4-5 and Exh. 2 in support thereof) (testimony of Mar. 28, 1995, reproduced at 1995

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1. California has long provided offers of collateral and appellate representation to all death row inmates; has made such appointments in response to inmate request, by written order, and pursuant to published competency standards; and has statutorily guaranteed every appointed counsel a reasonable sum for compensation and necessary expenses. See generally Pet. App. 86a-120a.

WL 146423 (FDCH)). A news article dated August 9, 1995, reported that Lungren "expects" the AEDPA's "streamlined procedures" to apply to all pending capital cases. See *id.* (Exh. 3) (San Francisco Daily J., Aug. 9, 1995, at 1).

C. Proceedings Below

The provocation for this suit, according to Ashmus, occurred when state officials publicly "indicated their belief" that Chapter 154 would govern federal review of California death judgments. Record, Doc. No. 6, pp. 4-5 (Memorandum in Support of Application for TRO). The suit's ostensible purpose, he explained, was to secure "a judicial determination" and "guidance" respecting the application of Chapter 154. J.A. 4-5. Claiming fears of "uncertainty" in that regard, *id.*, at 4, and anticipating that state officials would, unless restrained, argue the new law's applicability before federal judges, Ashmus originally styled his suit a "civil rights" action, but later recast its scope by characterizing state officials' expected conduct as a form of illegal "enforcement" actionable under *Ex Parte Young*, 209 U.S. 123 (1908). J.A. 2; compare Record, Doc. No. 6, pp. 4-5, with Record, Doc. No. 18, pp. 4-5 (Reply to Opposition to Application for TRO); *id.*, Doc. No. 30, pp. 4-8 (Reply to Memorandum in Opposition to Preliminary Injunction).[2] (Later still, Ashmus would

2. Though filed as a class action on behalf of every death row inmate in California, the complaint identified just one of the inmates by name—Mr. Ashmus, whose counsel filed a notice "relating" the suit, for purposes of judicial assignment, see No. Dist. Cal. Local R. 3-12, to his then-nascent habeas proceeding. Record, Doc. No. 9 (Notice of Related Case); see also *Ashmus v. Calderon*, 977 F. Supp., at 988 n. 3, 995. In a separate notice, Ashmus acknowledged that "some or all of the approximately 150 other cases in federal courts challenging California death judgments" might present issues concerning applicability of the AEDPA, but he claimed to be "unaware of any other action—habeas or otherwise—in which resolution of the issues raised by this case can be determined as quickly, efficiently, and thoroughly as will be accomplished in this case." Record, Doc. No. 4 (Notice of Pendency of Other Action). In fact, before the District Court in this case had even issued its TRO, the Chief Judge of the Eastern District of California had applied provisions of Chapter 154, see *Williams v. Calderon*, 83 F.3d 281, 283 (CA9 1996), and briefing on that same point had already been requested in at least one other pending case. See Record, Doc. No. 16, p. 2 (Defendants' Notice and Reply to Ashmus's Notice of Pendency and Exhs. O, P, Q in support thereof).

argue that his suit rested on the "All Writs Act," and he even suggested that enactment of the AEDPA "impliedly" created a cause of action, independent of habeas corpus itself, authorizing him to challenge state officials' assertions, see *id.*, Doc. No. 30, p. 4 n. 1; Doc. No. 45, pp. 2-3 (Opposition to Motion to Dismiss) (citing *Davis v. Passman*, 442 U.S. 228, 238, 243 (1979)), but these theories ultimately played no part in the decisions of either the District Court or Ninth Circuit.)

The District Court granted the requested relief, first issuing a temporary restraining order which, with minor modifications, was later extended and then converted into a preliminary injunction. J.A. 20, 24, 29; Pet. App. 35a-36a, 52a-53a, 61a. While recognizing that "the responsibility and obligation for determining when Chapter 154 applies" had been "entrusted to the *federal judiciary*" (rather than state officials), the court concluded that California death row inmates "will be forced to forfeit their rights under Chapter 153 as a direct result of the uncertainty over Chapter 154's applicability created by *defendants' assertions*." Pet. App. 32a, 33a (emphases added). While also acknowledging that the propriety of Ashmus's resort to the provisions of 42 U.S.C. §1983 presented "a difficult issue of first impression," the

resolution of which "is not entirely free from doubt," the court refused to dismiss this "novel" suit, but "independent[ly]" and "addition[ally]" conferred relief under 28 U.S.C. §§2201-2202, reasoning that death row inmates "fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act" and also "within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapter 153 and 154." Pet. App. 44a-48a, 78a; see also J.A. 31, 38-43.

Although none of the court's several orders directly addressed state officials' claim that the instant suit was barred by the Eleventh Amendment, the court did respond to their oft-stated insistence that Ashmus's uncertainty concerning application of Chapter 154 should properly be resolved by appropriate motion brought in the regular course of his habeas proceedings. While acknowledging that if Ashmus had followed the course proposed by state officials,

> ". . . the Court's decision would not have directly affected other district courts' resolution of Chapter 154's applicability in California. However, plaintiff did not bring the motion as defendants would have liked. Instead, plaintiff brought this action. The Court is required to resolve the question as it in fact was presented, not as defendants wish it had been presented." Pet. App. 60a.

State officials, observing that private parties who sue states and state officers invariably become embroiled in procedural disputes concerning the proper course of their litigation, also warned the District Court that accepting the logic of Ashmus's suit would have dire implications: Each such dispute arising in the course of any pending suit would supply the basis for yet another suit against state officials to preempt them from taking whatever position the private party believes to be "wrong" and thus a

"violation" of the private party's "right" to a "correct" application of law. Supplemental Excerpt of Record on Appeal (SER) 138 (Transcript of District Court Proceedings). The court responded:

> "[State officials] have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 [] (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, 'death is [] different.'" Pet. App. 47a-48a.

With that understanding, the court enjoined state officials as follows:

> "[D]efendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the state of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any class member." *Id.*, at 76a-77a.[3]

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3. The referenced class consists of all death row inmates in California, "except those such [sic] persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989" (that date marking the point at which, state officials have asserted, the state adopted a mechanism that would qualify under Chapter 154). Pet. App. 52a-53a, 61a. The class thus includes inmates who have invoked the habeas jurisdiction of the federal courts after having failed to obtain relief in their now-concluded state review procedures, as well as those who have yet to complete their state review.

The District Court expressly rejected state officials' constitutional objections to having their adversarial activities enjoined. While conceding that state officials "certainly have a fundamental First Amendment right to express their views" on the applicability of Chapter 154, the court suggested their rights must yield to federal injunctive power because the "manner" in which state officials expressed their views had placed death row inmates "in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." Pet. App. 35a; see generally *id.*, at 30a ("[D]efendants and their agents have consistently and vigorously maintained that California qualifies for Chapter 154's benefits . . . . "). While again acknowledging that its injunction barring state officials on a statewide basis from advocating their views on the applicability of Chapter 154 also "may constrain the ability of other co-equal district court judges to decide the issue differently," the court nonetheless reiterated its belief that it was "obligated" to act as it did. *Id.*, at 59a-60a; see *id.*, at 30a (acknowledging that the identical issue had been raised "in other cases pending before federal courts in California"); see also *id.*, at 60a (acknowledging that its decision "directly affected other district courts' resolution" of the issue). The ensuing injunction against future advocacy by state officials "in any state or federal proceeding involving any class member" thus rested on "the district court's determination that California does not comply with Chapter 154" in five respects.[4] See Pet. App. 8a-9a.

4. First, the court concluded that California's refusal to expend public funds for "fishing expeditions" to uncover "any" basis for a collateral claim, though a "sensible" limitation, is "objectively deficient" because it assertedly restricts appointed counsel to pursuing only those collateral issues "that are knowable by reference to the four corners of the appellate record." Pet. App. 65a-67a. Second, because counsel appointments do not occur "immediate[ly]" (as evidenced by the fact that many California death row inmates have requested appointment but not yet received one and will likely wait "some time" before they do), the court determined that appointments are not made "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.*, at 75a. Third, the court discerned no qualifying counsel standards because their specification appears in section 20 of the Standards of Judicial Administration, which is neither a "statute" nor a "rule of court" within the meaning of the state constitution. *Id.*, at 69a-70a. Fourth, section 20's standards were deemed inadequate because they are not "binding or mandatory." *Id.*, at 70a-73a. Finally, the standards were found deficient because they make "no mention of original habeas proceedings and . . . require[] no minimum experience whatsoever in habeas proceedings." *Id.*, at 73a-74a.

By a 2-1 decision, the Ninth Circuit rejected one of the grounds on which the District Court concluded California failed to qualify, Pet. App. 19a[5], but agreed with the remaining points and affirmed. *Id.*, at 18a, 20a, 22a. As a threshold matter, the majority declined to follow the Fourth Circuit's recent decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), whose teaching would have required outright dismissal of this prisoner suit under the Eleventh Amendment; instead, while expressly declining to discuss Ashmus's attempted reliance on §1983, the court determined that "the present action falls within the *Ex Parte Young* exception, and the Eleventh Amendment does not bar this suit" because the plaintiff class had "identifi[ed] a continuing or impending violation of federal law," as follows:

5. The Court of Appeals rejected the District Court's determination that California's published counsel standards were "inadequate under Chapter 154 because [they do] not require appointed counsel to have familiarity with habeas corpus litigation." Pet. App. 19a; see generally *ante*, note 4. The Ninth Circuit's rejection, however, was not based on the fact Congress had imposed no such "requirement," but on that court's own "reluctan[ce]" to do so. Pet. App. 19a.

"They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to assistance of counsel, pursuant to 21 U.S.C. §848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) 'grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any federal post conviction proceeding.' *McFarland v. Scott*, 114 S. Ct. 2568, 2571 (1994) (internal quotations and footnote omitted)." Pet. App. 9a-10a.

After observing that many death row inmates in California have long awaited appointment of state counsel, the majority concluded that

"By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.

"Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to

restrictive federal review. The downside of choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great.

If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel. In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court." *Id.*, at 10a-11a (footnote omitted); see also *id.*, at 20a ("California cannot take advantage of the six-months limitations period when it takes years to appoint counsel").

"It is no answer," the court continued,

"to say that a district court might allow the condemned prisoner to amend his bare bones petition. A district court might not allow the amendment. *See* 28 U.S.C. §2266(b)(3)(B) (prohibiting amendment after answer is filed unless petitioner demonstrates amendment is not an abuse of the writ). Should this happen, the prisoner will be stuck with what most likely will be a losing first petition; and when that petition gets denied any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive petitions. If he loses on his successive petition, he will die." *Id.*, at 11a-12a.

The Ninth Circuit made no finding that questions concerning the applicability of Chapter 154 would escape resolution unless it allowed Ashmus's lawsuit to go forward; to the contrary, without acknowledging that a demonstrated need for bringing suit under *Ex Parte Young* is one of the preconditions to doing so, the court noted that the prisoners could test their understanding of the law against state officials' competing assertions by litigating

those disputes in the course of any habeas proceedings in which they arise. Indeed, it was that state of affairs that caused the majority to see "little, if any" difference in "impact on the State's sovereign interests" between, on the one hand, having the state litigate the issue by motion in habeas proceedings and, on the other hand, forcing state officials to defend their conduct in a separate *Ex Parte Young* action. Pet. App. 12a. Either way, the majority observed, California would be "haled into federal court to determine whether it qualifies under Chapter 154." *Ibid.* The Ninth Circuit concluded that allowing this separate suit actually protects the state's sovereignty interests and promotes "efficiency and fairness" by reducing delay, saving tax dollars, and eliminating any potential that "divergent district court opinions could occur." *Id.*, at 13a (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2038-2040 (1997) (principal opinion of Kennedy, J., joined by Rehnquist, C.J.)); *Booth v. Maryland*, 940 F. Supp. 849, 852 n. 3 (D. Md. 1996), rev'd, 112 F.3d 139 (CA4 1997)). Unlike the District Court, the Ninth Circuit did not embrace the proposition that "death is different" as a basis for restricting the scope of its decision allowing Ashmus's suit, nor did it identify any alternative "limiting principle" of its own.

Finally, the Ninth Circuit agreed with the District Court that its injunction was "necessary to effectuate its declaratory judgment." Pet. App. 20a. "Had the district court not issued the injunction," the court observed, "California would have been *free to assert* in other federal and state proceedings the same position it asserts in this case." *Ibid.* (emphasis added). Indeed, despite the injunction's "direct[]" impact on established adjudicatory procedures and the capacity of other courts "to decide the issue differently," it did not, according to the Ninth Circuit, impinge on state officials' First Amendment rights to

advocate defensively against collateral attacks waged upon the state's criminal judgments:

> "The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements." Pet. App. 21a.

Judge Beezer dissented, having been "persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense." Pet. App. 23a. He concluded that "'[t]his action,' like the inmate suit in *Booth*,

> "'fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a Chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either . . . .'" *Id.*, at 23a (quoting *Booth*, 112 F.3d at 144 (citing *Green v. Mansour*, 474 U.S. 64, 74 (1985))).

State officials filed a petition for writ of certiorari seeking review of the Ninth Circuit's determinations (i) that the inmate's suit was not barred, (ii) that the district court's injunction is not unconstitutional, and (iii) that California's mechanism for collateral review of claims by death row inmates does not comport with Chapter 154.

The Court granted certiorari limited to the first two questions. 522 U.S. ___ (1997).

SUMMARY OF ARGUMENT

Lawsuits by private parties over matters of governmental prerogative are indignities from which states and state officials are generally protected by the Eleventh Amendment. The *Ex Parte Young* doctrine provides a narrow exception to this general rule for suits undertaken "to end a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). But "*Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is '*necessary* to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States."'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (citations omitted) (emphasis added).

This lawsuit is wholly *un*necessary. Even Ashmus now concedes that his purpose in bringing it—to alleviate, by means of "a judicial determination," his "uncertainty over application of Chapter 154"—could be accomplished, and "properly" so, in "individual habeas proceedings." Brief in Opposition 7. A plethora of reported cases conclusively demonstrates the truth of that proposition, and the District Court, which inexplicably declared itself "required" to entertain the issue in the manner Ashmus had selected, never concluded otherwise. The Ninth Circuit expressly acknowledged that death row inmates can test their understanding of Chapter 154's applicability against state officials' competing assertions by litigating those disputes in the course of habeas proceedings, but the court wholly overlooked the constitutional significance of that fact. Pet. App. 12a. Thus, in a decision that does nothing less than turn "'[t]he principles of federalism that

inform Eleventh Amendment doctrine" on their head, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted), the Ninth Circuit actually went on to use the conceded *availability* of a prescribed course of redress—a feature of the law that, properly understood, *secures* the state's sovereign immunity from suit under the Eleventh Amendment—as a basis for *defeating* that immunity.

It is precisely because determining the applicability of Chapter 154 is a task that "Congress . . . entrusted to the *federal judiciary*," Pet. App. 33a (emphasis added), that any actual "enforcement" of Chapter 154 will be provided by the federal courts—not by either party, and most certainly not by state officials alone. For these same reasons, state officials do not "violate" Ashmus's federal "rights" by failing to agree with his preferred understanding of federal law or by letting him know that they plan to share their differing views with the federal courts. Quite to the contrary, it is the adversarial process itself—the process by which both parties "assert" their differing views—that provides definition to their dispute and thereby facilitates, rather than impedes, the task of "judicial determination." Ashmus's access to judicial process to resolve his uncertainty having never been impaired by anyone, he had no warrant to sue state officials under *Ex Parte Young*.

In the end, Ashmus's suit is worse than unnecessary; it is destructive of the concerns for federalism and comity that Congress took into consideration when formulating the permissible contours of federal habeas corpus litigation. See generally *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1132-1133 (1996). Indeed, even if the *Ex Parte Young* doctrine were extended to allow a separate suit to litigate the application of Chapter 154, that suit could not properly be employed—as Ashmus has used it—to *circumvent* the array of procedural limitations

attendant to the habeas corpus scheme. See also *id.*, at 1182-1183) ("[T]hat a state prisoner may circumvent [habeas] restrictions by ostensibly bringing his suit under *Young* rather than 28 U.S.C. §2254 . . . cannot be the law") (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

Further compounding the damage to constitutional values occasioned by Ashmus's suit itself is the "remedy" fashioned below: a content-based, viewpoint-specific prior restraint on state officials' First Amendment rights to engage in lawful advocacy, rights that are essential to the effective functioning of our adversarial system. Such an unprecedented injunction is an affront to "the well-tested principle that truth—as well as fairness—is "'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 74, 84 (1988).

Courts, like other arms of government, have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Indeed, because "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do ordinances," they are subject to heightened scrutiny: Even a content-*neutral* injunction will be struck down unless it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

The injunction issued in this case bans legal advocacy in the very fora where legal advocacy is expected to flourish: our nation's courts. Such an infringement on constitutional freedoms cannot be justified by one court's desire to avoid future decisions "divergent" from its own. *All* courts can be equally expected to reject legal arguments when that course is required or appropriate. But "thwarting the development of important questions of law

by freezing the first final decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984), will rarely serve the interests of justice. The injustice in doing so in this case is manifest: Chapter 154's application in California is, at the very least, an issue over which reasonable minds might differ, and about which even Ashmus himself confessed "uncertainty." The analyses employed by the District Court and Ninth Circuit alike to resolve that question are patently flawed, and thus, were it not for the injunction, the risk of "divergent opinions" would be substantial, indeed. But as useful and appropriate as injunctions might be in other circumstances, our constitution forbids their use for the benighted purpose of permanently insulating judicial error from those regular legal processes by which it can be identified, scrutinized, and ultimately corrected.

The First and Eleventh Amendments require that the judgment be vacated and the suit dismissed.

ARGUMENT

I.

ASHMUS'S SUIT IS BARRED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment "'is an explicit limitation on the judicial power of the United States.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S., at 119. It bars "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Amendment recognizes "that each State is a sovereign entity in our federal system," *Seminole Tribe*, 116 S. Ct., at 1122, and "effectively confers an immunity from

suit." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

"The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). Accordingly, "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S., at 101; *id.*, at 114, n. 25 ("To say that injunctive relief against State officials acting in their official capacity does not run against the State is to resort to . . . fictions"); *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 350 (1945) ("The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest'"); accord, *Coeur d'Alene Tribe*, 117 S. Ct., at 2034.

But "the Eleventh Amendment is not in all cases a bar to federal court interference with individual state officers alleged to have acted in violation of federal law." *Arkansas v. Farm Credit Services of Central Arkansas*, 117 S. Ct. 1776, 1780 (1997). This Court's decision in *Ex Parte Young*, 209 U.S. 123, created an exception to Eleventh Amendment immunity: the *Young* doctrine confers "federal jurisdiction over a suit against a state official when that suit seeks only prospective relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe*, 116 S. Ct., at 1132 (citing *Green v. Mansour*, 474 U.S., at 68). The exception is a narrow one, however. *Puerto Rico Aqueduct*, 506 U.S., at 146. Indeed, "*Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights and

hold state officials responsible to "the supreme authority of the United States."'" *Papasan v. Allain*, 478 U.S., at 277 (quoting *Pennhurst*, 465 U.S., at 105 (quoting *Young*, 209 U.S., at 160)). Accordingly, where essential "access to the courts" is not otherwise foreclosed to those who feel threatened by state officials' conduct, and the lawfulness of that conduct is thus subject to timely judicial scrutiny before it can have the injurious consequences the alleged victims would attribute to it, *Ex Parte Young* supplies no authorization for preemptive suits against state officials. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-218 (1994) (distinguishing *Ex Parte Young*); see also *Reisman v. Caplin*, 375 U.S. 440, 446-450 (1964) (same).

Congress, of course, can also abrogate Eleventh Amendment immunity and authorize suits against states or state officials that would otherwise be barred, provided that it "unequivocally expresses its intent" to do so and acts "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S., at 68, *Pennhurst*, 465 U.S., at 99. More particularly, "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore . . . §5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole Tribe*, 116 S. Ct., at 1125; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

A. The Declaratory Judgment Act Effects No Congressional Abrogation of Eleventh Amendment Immunity

The district court ordered relief on authority of both (1) the Declaratory Judgment Act and its enforcement provision, 28 U.S.C. §§2201-2202, and (2) the Civil Rights Act, 42 U.S.C. §1983, although it acknowledged that Ashmus's theory of "rights-violation" was "novel" and the

"cognizability" of his suit under §1983 "not entirely free from doubt." Pet. App. 43a-48a, 76a-78a. The Ninth Circuit likewise construed Ashmus's complaint to contain "a 'claim' or 'cause of action' under the federal Declaratory Judgment Act, 28 U.S.C. §2201, and under 42 U.S.C. §1983," but expressly declined to address whether Ashmus had properly invoked the latter provision. Pet. App. 14a, 21a.

Assuming *arguendo* that the Declaratory Judgment Act, as a general matter, actually creates some free-standing "cause of action," rather than a form of accelerated remedy,[6] Congress, by enacting that provision, manifested no intent—much less an "unequivocally expressed intent"—to effect wholesale abrogation of the Eleventh Amendment. As this Court stated in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.*, at 246; see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, n. 4 (1991) ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim"). Nor, of course, is there any valid "power" reposed in Congress pursuant to which it could have indiscriminately exposed states and state officials to *every* suit for declaratory judgment. See *Fitzpatrick v. Bitzer*, 427 U.S., at 456; see also *Seminole Tribe*, 116 S. Ct.,

6. Jurisdiction, cause of action, and relief or remedy (as well as standing) are, of course, different things. See *Davis v. Passman*, 442 U.S., at 240, n. 18; *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995) (referring to "the declaratory judgment *remedy*," which had been sought in that case to determine whether an insurer's refusal to defend or indemnify would constitute a breach of contract) (emphasis added); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 ("The operation of the Declaratory Judgment Act is procedural only"); 28 U.S.C. §2201 ("Creation of remedy") (caption).

at 1124 ("[T]he relief sought by a plaintiff suing a state is irrelevant to . . . whether the suit is barred by the Eleventh Amendment").

B. The *Ex Parte Young* Doctrine is Inapplicable Because Adherence to Federal Habeas Corpus Law is Accomplished by *Judicial* Rulings, and State Officials Neither "Violate" Nor "Enforce" Federal Law by Advocating their Understanding of Federal Law to a Federal Court

There plainly being no blanket congressional abrogation of Eleventh Amendment immunity from a suit as extraordinary as the one Ashmus brought here, the Ninth Circuit struggled to justify it under the doctrine of *Ex Parte Young*. But in concluding that "the *Ex Parte Young* exception applies," Pet. App. 9a-13a, the court committed two crucial errors in analysis: First, it mischaracterized state officials' mere assertions about the applicability of Chapter 154 as "violations" of federal law. Next, while recognizing that Ashmus's suit was not necessary to prevent the "violations" of law it hypothesized, the court failed to appreciate that the *Ex Parte Young* doctrine was, for that very reason, inapplicable. To demonstrate the full extent of the Ninth Circuit's errors of analysis, we begin by briefly reviewing the *Ex Parte Young* decision itself, and the circumstances in which that case arose.

1. *The* Ex Parte Young *Doctrine authorizes suits against state officials when necessary to vindicate the "supreme authority of the United States"*

In 1906 and 1907, the Minnesota legislature enacted a series of laws that imposed maximum rate and tariff schedules on the railroad industry. Shareholders of one railroad hoped to challenge the rates as unconstitutionally

confiscatory, but efforts by the railroad to mount such a challenge were thwarted by yet another unconstitutional feature of the Minnesota law: If the railroad complied with law, it forfeited any possibility of having the law subjected to judicial review; but if it violated the law to provide means for its challenge, the railroad risked enormous fines and imprisonment of company officers and employees. Such a scheme, this Court explained, "prohibited the company from seeking judicial construction of laws which deeply affects its rights" and operated "in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question . . . ." 209 U.S., at 147, 148.

Under these circumstances, this Court approved resort to an equitable action against the Minnesota Attorney General, finding

> "that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws *of the state*, and who threaten to *commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.*, at 155-156 (emphases added).

Such a suit survives an Eleventh Amendment challenge, the Court explained, because the federal injunction barring a state official from enforcing an unconstitutional state statute "simply prohibit[s] him from doing an act which he ha[s] no legal right to do." *Id.*, at 159. The Court continued:

> "It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any *immunity from responsibility to the supreme authority of the United States*." *Id.*, at 159-160 (emphasis added).

This Court was careful to add, however, that the injunctive authority of federal courts established by its decision

> "does not include the power to restrain a[nother] court from acting in any case brought before it, either of a civil or criminal nature . . . .
>
> "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." *Id.*, at 163.

2. *The* Ex Parte Young *doctrine has no application to the "enforcement" of federal laws governing litigation of habeas corpus proceedings*

The decision in *Ex Parte Young* is of no use to Ashmus because "[t]he situation presented here is sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 116 S. Ct., at 1132. Indeed, the differences abound.

a. *The respective roles of federal judges and state officials in federal habeas litigation*

As respondents in federal habeas corpus actions, state officials never "commence" any proceedings of any kind. Compare, *e.g., Morales v. Trans World Airlines, Inc.*, 503 U.S. 374 (1992) (observing that "*Ex Parte Young* . . . speaks of enjoining state officers 'who threaten and are about to commence proceedings'"). Rather, such proceedings are instituted by state prisoners, and state officials make their appearances in that litigation solely to protect the state's final judgments from the prisoners' collateral attacks.

Moreover, the array of defenses available to state officials in habeas suits is defined by federal cases and statutes. *E.g., Coleman v. Thompson*, 501 U.S. 722, 731-732 (procedural default); 28 U.S.C. §2254 (deference to state court disposition). Thus, when a state official "asserts" the application of Chapter 154, for example, the official "invokes" *federal* law, not any state law that might assertedly be "in conflict" with federal law.

Of course, by merely "invoking" federal law in this way, state officials perform no "enforcement" of it within the meaning of *Ex Parte Young*. Compare, *e.g., Steffel v. Thompson*, 415 U.S. 452, 454 (1974) (free speech challenge to state criminal statute, enforcement of which is accomplished through arrest and prosecution by state officials); *Morales v. Trans World Airlines, Inc.*, 503 U.S., at 381-382 (preemption challenge to state "enforcement actions" respecting regulation of airline fare advertising). The task of "enforcing" Chapter 154 (or any provision of federal habeas corpus law, for that matter) is one that "Congress has . . . entrusted to the federal *judiciary*," Pet. App. 33a (emphasis added), not to the parties, and most certainly not to state officials alone. Cf. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-299 (1937) (rejecting

effort to enjoin state officials from "seek[ing] . . . a judicial determination") (distinguishing *Young*); *NAACP v. Meese*, 615 F. Supp. 200-203, and nn. 7-8, 206 (DC 1985) (rejecting effort to enjoin United States Attorney General from advancing an interpretation of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) that is "far different and broader" than that of plaintiffs and some courts).

With "enforcement" of Chapter 154 no more falling to state officials than it does to state prisoners, neither party to habeas litigation has any basis to fear that the other's "assertions" about the subject will "close up all approaches to the court, and thus prevent any hearing upon the question." Compare 209 U.S., at 148. Quite to the contrary, it is the parties' issuance of competing "assertions" that defines the contours of the dispute, and thus serves as an implicit demand for *judicial* resolution. In this way, a federal litigant's "right" to a proper application of federal law can be neither vindicated nor "violated" by his or her adversary; rather, that power lies with the federal court, which has sole responsibility for resolving contested points of federal law. Cf. *Meese*, 615 F. Supp., at 203 and nn. 7-8. Under this adjudicative model (which is hardly unique to federal habeas corpus proceedings), both parties are afforded an equal opportunity to articulate their views, after which one party will prevail on the point and the other wili lose. The court's ruling, of course, might not necessarily be correct. But even if it is ultimately adjudged by a higher court to be wrong, the party that had prevailed under the earlier ruling inflicted no "violation" of his or her opponent's "rights"; at worst, the lower court committed an error that will have proved correctable on further review.

The unanimous decision of the Fourth Circuit in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), succinctly states why *Ex Parte Young* is not available to an inmate like

Ashmus who seeks to prevent the state from defending its criminal judgments through reliance on legal arguments he does not like and believes to be erroneous: "Neither the invocation of a Chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with Chapter 154 constitutes a continuing violation of federal law." *Id.*, at 144. The Ninth Circuit erred in concluding otherwise, and by its related refusal to acknowledge that Ashmus's extraordinary suit was in no sense "necessary" either to prevent the "violation" of federal rights it mistakenly attributed to state officials or otherwise "hold [them] responsible to the 'supreme authority of the United States.'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986).

To say, as did the Ninth Circuit, that Ashmus had "identif[ied] a continuing or impending violation of federal law" by characterizing state officials' "announced intention" to advocate for application of Chapter 154 as a "threat" to "deprive . . . prisoners of their rights to federal review under Chapter 153," Pet. App. 10a, 12a, is to engage in mere wordplay. This clumsily-phrased accusation against state officials—the keystone of the Ninth Circuit's *Ex Parte Young* analysis—not only assumes, *a priori*, a general "right" of litigants to be spared contestation in connection with the resolution of concededly "uncertain" legal issues, but wholly ignores the very point the Ninth Circuit's own opinion goes on to demonstrate: It is the federal *courts* themselves, not the parties before them, that select the law under which all "federal *review*" is conducted.

Likewise, there is no merit to the Ninth Circuit's accusation that the state, by dint of asserting its disagreement with death row inmates over Chapter 154's application, "forces" them "to file bare bones petitions within the 180-day time limit before counsel will have been appointed to assist them." Pet. App. 12a. The Ninth Circuit's

theory here is that the prisoner's other "option"—"awaiting] the appointment of counsel and, consequently, fail[ing] to file a petition within the 180-day period"—will risk future detriment through application of §2262(c) (providing that "[n]o Federal court thereafter shall have the authority to enter a stay of execution . . . unless the court of appeals approves the filing of a second or successive application under section 2244(b)") and possibly cause any later-filed petition itself to "be deemed a successive petition subject to restrictive federal review." Pet. App. 11a; see also *id.*, at 5a-6a. Given the "life and death stakes" of the litigation more generally, the Ninth Circuit sees this as "an unacceptable choice" that will invariably provoke the affected inmate to file within the 180-day deadline, even though that deadline is assumedly inapplicable, and "in all likelihood he will have to do so without the assistance of counsel." *Id.*, at 10a-11a. According to the Ninth Circuit, any prisoner following that course will thus suffer a violation of rights secured under Chapter 153 and 21 U.S.C. section 848(q) as follows: The opportunity to amend such a petition will become circumscribed by §2266(b)(3)(B) (providing that no amendment will be permitted after the answer is filed unless the petitioner demonstrates that the amendment is not an abuse of the writ), in which event "the prisoner will be stuck with what most likely will be a losing first petition"; in turn, "any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive petitions," and, the Ninth Circuit observed, if the prisoner "loses on his successive petition, he will die." *Id.*, at 11a-12a.

The court's entire discussion of these several points rests on numerous misapprehensions of law. But even assuming the law were as the Ninth Circuit misstates it, the analysis that proceeds from that understanding is riddled with internal contradiction.

To begin with, if Chapter 154 is not applicable, then the "choice" it might otherwise present is one that no inmate will need to confront, and no amount of contrary assertions by state officials can adjudge any petition "late" by reference to an inapplicable deadline. Likewise, the consequence of filing within the 180-day period when there is no actual compulsion under Chapter 154 to do so, cannot be a bar to later amendment by operation of §2266(b)(3)(B) inasmuch as that section, also a part of Chapter 154, is, by hypothesis, just as *in*applicable.[7]

On the other hand, if Chapter 154 does apply, state officials' momentary silence on the point would not shelter prisoners from any of its consequences, including imposition of the 180-day deadline. Indeed, that deadline being precisely what Congress mandated, the "choice" it presents is one that, however "unacceptable" the Ninth Circuit might view it, prisoners will need to confront, lest Congress's mandate be altogether defeated.

Moreover, it is simply impossible for either of the consequences that made the choice seem so "unacceptable" to the Ninth Circuit—*i.e.*, denial of a stay sought in connection with the filing of first petition beyond 180 days (§ 2262(c)), or denial of amendment to an existing petition

7. The court identified no other potential detriment to "premature" filing, and none is remotely conceivable; indeed, there was no reason to assume that "premature" filing would ever need to occur: The state implored the District Court to relieve Ashmus's uncertainty by ruling on the applicability of Chapter 154's provisions "just as soon as it feels prepared to do so," and further stipulated that if Ashmus nevertheless filed his petition within the 180-day limit "out of an abundance of caution" and were only later to learn of its inapplicability, "he can always withdraw his petition and refile it within the applicable period [*i.e.*, one year, see §2244(d)(1)], augmented with whatever additions or changes he deems fitting." SER 21; Record, Doc. No. 11, p. 18 (Memorandum in Opposition to Application for TRO).

filed within 180 days (§2266(b)(3)(B))—to occur without a federal court's determination that, contrary to the Ninth Circuit's assumption, the provisions of Chapter 154 *are* applicable. In that event, state officials' early warnings to precisely that effect can scarcely constitute a "violation" of federal law, even accepting the Ninth Circuit's novel construction of that term. But it is, of course, just that peculiar construction by the Ninth Circuit that supplies the central feature of that court's larger error: its assiduous refusal to acknowledge that any "enforcement" of Chapter 154—whether by denial of a stay under §2263, or by denial of amendment under §2266, or by *any other ruling*—will necessarily be provided (or not) by a federal court, not state officials.[8]

8. Finally, by its repeated references to federal petitioners being "without counsel" or having to "await appointment" during some or all of the 180-day filing period, the Ninth Circuit appears to suggest that delay in the appointment of *federal* counsel either (1) represents some additional respect in which inmates suffer a deprivation of their federal rights at the hands of state officials, Pet. App. 10a-12a, or (2) directly demonstrates California's failure of compliance with Chapter 154, *id.*, at 20a. The Ninth Circuit is mistaken: Responsibility for the appointment of federal habeas counsel lies with the federal courts, see 21 U.S.C. §848(q), not with the states whose judgements are being attacked. And no earlier delay in the appointment of *state* counsel will cause inmates to be "without counsel" for any portion of the 180-day *federal* filing period inasmuch as that period does not even start to run until state review has run its regular course, 28 U.S.C. §2263(a), (b)(2), an event that necessarily will not occur until well after counsel is appointed to provide representation in state unitary proceedings. At any rate, the length of time it takes to appoint either state counsel or federal counsel is simply irrelevant to whether Chapter 154 will ultimately be applicable in federal proceedings.

b. *The adequacy of established procedures and the dangers of departing from them*

As noted, Ashmus himself claimed "uncertainty about the application of Chapter 154," a condition he found "unconscionable given the consequences of misjudgment and misinterpretation of the controlling law." He thus demanded a prompt "judicial determination" of the issue on which he and state officials stood divided. J.A. 4-5. Although his request for timely "guidance" under these circumstances was reasonable, the decision to initiate a second lawsuit against state officials, and to characterize their mere refusal to agree with him on a legal point as a "violation" of his federal civil rights, most certainly was not.[9]

For their part, state officials never disputed the importance of the underlying issue concerning application of Chapter 154. Accordingly, they repeatedly encouraged Ashmus to seek, and beseeched the District Court to issue, an order in his habeas proceeding providing the necessary guidance; they even reassured him they would stipulate to the issuance of a stay if he somehow found himself facing an imminent execution date and any question arising under Chapter 154 still "remained in need of resolution." See, *e.g.*, SER 20-23, 27-29, 69-70, 97-98, 130-131, 137, 145, 148-150; Record, Doc. 11, pp. 3-4; *id.*, Doc. No. 25, p. 5 (Memorandum in Opposition to Prelim-

9. In a parallel (but arguably more compelling) context, the Ninth Circuit had earlier rejected a litigant's effort to convert an alleged instance of adversarial wrongdoing committed by his opponent during the course of a pending suit into a basis for yet another suit. *Dooley v. Reiss*, 736 F.2d 1392, 1393-1395 (CA9 1984) (noting that litigation of a "parent" suit will ordinarily furnish the opportunity to address any improprieties occurring in the course of those proceedings, making any separate "sucker" suit undertaken for that same purpose unnecessary). Apparently unable to distinguish the holding in *Dooley*, Ashmus, like the Ninth Circuit, simply ignored it.

inary Injunction). While further noting that Ashmus's separately-filed action for equitable relief against state officials was barred by the Eleventh Amendment, state officials took great pains to explain that an appropriate motion filed in connection with his habeas action (as to which state officials enjoy no immunity) would also prove to be the far simpler and more expeditious method for resolving his uncertainty. SER 21-23, 27-29, 53-55, 69-70, 97-98, 137; see also Record, Doc. No. 11, pp. 6-7 and n. 2; see generally *Preiser v. Rodriguez*, 411 U.S. 475, 495-496 (comparing the "swift, flexible, and summary" attributes of habeas procedure with the procedural formalities and protraction typically associated with "an original plenary civil action"); *Booth*, 112 F.3d, at 144 (noting that it is less damaging to state sovereignty to resolve Chapter 154's applicability during habeas proceedings than to do so by entertaining yet another lawsuit); *Meese*, 615 F. Supp., at 203 (noting that motion practice provides a "far more appropriate, far more logical remedy than a [separate] lawsuit . . . seeking injunctive relief").

Ashmus could not seriously dispute the availability of the course the state urged him to follow, but see SER 6, and the adequacy of that course—as well as the utter lack of any "necessity" for pursuing the vastly more cumbersome and disruptive course he chose—is now clear beyond cavil. See authorities cited in Brief in Opposition 16 n. 10; cf., *e.g.*, *Felker v. Turpin*, 116 S. Ct. 2333 (1996) (resolving issues arising under AEDPA amendments to Chapter 153); *Lindh v. Murphy*, 117 S. Ct. 2059 (same).[10]

10. Ashmus knows this firsthand. On April 18, 1997, when he developed additional "uncertainty"—this time concerning the application of the AEDPA's amendments to Chapter *153*—he filed a motion; a mere six days later he had his answer from the District Court: The amendments will govern Ashmus's proceedings, but the new one-year filing deadline would be immediately "tolled." See 977

Even Ashmus now concedes that the "judicial determination" he sought by this suit "is one that may properly be made in individual habeas proceedings." Brief in Opposition 7. That concession alone is fatal to his attempted reliance on *Ex Parte Young* (even assuming that mere advocacy can constitute a "violation" of law), for if a separate lawsuit against state officials is not necessary to hold them responsible to "the supreme authority of the United States," then the entire basis for the *Ex Parte Young* doctrine disappears. See also *Thunder Basin Coal*, 510 U.S., at 221 (Scalia, J., concurring). The lack of any such "necessity" here is palpable.[11]

Habeas Corpus Law itself is characterized by a carefully crafted and comprehensive statutory mechanism that guarantees both effective judicial enforcement of the litigants' procedural rights and meaningful appellate oversight; its structure embodies the concerns for federalism and comity that Congress took into consideration in its formulation. See generally 28 U.S.C. §2241 et seq; see also *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*." *Seminole Tribe*, 116 S. Ct., at 1132. "The balance, completeness, and structural

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F. Supp., at 988, n. 3.

11. An *Ex Parte Young* action is also not needed by those inmates whose state proceedings are still pending, albeit for a somewhat different reason: Inasmuch as their state review is not completed, those inmates could yet obtain relief from the state court, and they thus have neither occasion to seek nor entitlement to secure *any* federal review under *either* Chapter 153 *or* 154. If, however, state relief should ultimately be denied, then those inmates can obtain the desired "judicial determination" in precisely the manner Ashmus concedes is available.

integrity," *Brown v. GSA*, 425 U.S. 820, 832 (1976), of habeas corpus procedures precludes their supplementation by judicial stroke. See also *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952) ("[T]he declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review") (emphasis added); *Green v. Mansour*, 474 U.S., at 73 (declaratory judgment not available to "end run" other rules).

Indeed, with federal habeas being a form of litigation that, even under the best of circumstances, "'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority,'" *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (quoting *Harris v. Reed*, 489 U.S. 255, 282 (Kennedy, J., dissenting)), there is perhaps no other context in which it would be less appropriate to indulge ad hoc, judicially-inspired departures from the procedures approved by Congress.[12] At

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12. The comprehensive remedial character of the habeas scheme would likewise preclude Ashmus's attempted resort to the provisions of 42 U.S.C. §1983. *Middlesex County Sewerage Auth. v. National Sea Clammer's Ass'n*, 453 U.S. 1, 20 (1981); *Blessing v. Firestone*, 117 S. Ct. 1353, 1359-1360 (1997). Relatedly, his "civil rights" theory would ultimately fail for substantially the same reason that also dooms his *Ex Parte Young* construct: The advocacy of one's adversary, even if erroneous, simply entails no violation of federal law, and *a fortiori*, no violation of any federal rights. See *Blessing*, *supra*, at 1359. Indeed, it is manifest that the reforms of federal habeas law provided by Chapter 154—a measure passed by "a Congress intent on expediting capital habeas cases," *Lindh*, 117 S. Ct., at 2065, and "concern[ed] with the perceived acquiescence in capital defendants' dilatory tactics by some federal courts," *id.*, at 2069 (Rehnquist, C.J., dissenting)—were not fashioned to "benefit" death row inmates, and that legislation therefore invests them with no enforceable federal rights of any sort, *Blessing, supra,* at 1361, much less does it create any

the very least, for a federal court to blithely and unnecessarily disrupt the carefully balanced structure of the habeas regimen by (i) subjecting a state to yet another entire lawsuit (rather than requiring it to argue a motion in an existing one), (ii) indulging allegations that a state's legal position amounts to a "violation" of law (rather than an arguably mistaken view of it), and (iii) dictating to a state which legal arguments it may ultimately advance in defense of its criminal judgments (rather than rejecting the ones it finds unpersuasive), and then to attempt to pass off those several indignities as events having "little, if any, impact on the State's sovereign interest,"[13] is to wholly

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additional causes of action by "implication." At any rate, by his suit Ashmus did not seek California's "compliance" with Chapter 154 (which is in no manner required by federal law); rather, he sought the "benefits" flowing from a finding that the state is in *non*-compliance.

13. In ostensible support of this remarkable characterization, the Ninth Circuit cited the principal opinion in *Coeur d'Alene Tribe*, 117 S. Ct., at 2038-2040 (opinion of Kennedy, J., joined by The Chief Justice). The Ninth Circuit apparently believes the relevant focus under *Ex Parte Young* has now shifted from whether a suit against state officials is necessary to vindicate the supremacy of federal law to whether the suit serves the federal judiciary's notion of "efficiency and fairness." This understanding will find no support in *Coeur d'Alene Tribe*. Demonstrating that an officer suit is "necessary for the vindication of federal rights," *id.*, at 2038, remains an essential element of the *Ex Parte Young* doctrine, although that showing alone might not be sufficient to sustain an officer suit if there are other "special factors counseling hesitation." *Id.*, at 2039 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). Of course, if the inestimable protection afforded state sovereignty under the Eleventh Amendment is ever actually offset by some other state interest of equal or greater value (such as saving "tax dollars," to take the Ninth Circuit's example), state officials can be expected to appreciate as much; in that case, immunity might appropriately be waived by the state, see *Pennhurst*, 465 U.S., at 99 (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), but not summarily stripped away based on a federal judge's sense of what is "'clearly'" in the state's best

ignore "'[t]he principles of federalism that inform Eleventh Amendment doctrine.'" *Pennhurst*, 465 U.S., at 100 (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)); see also *Ex Parte Young*, 209 U.S., at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer"); *Rizzo v. Goode*, 423 U.S. 362, 377-378 (1976); *Meese*, 615 F. Supp., at 206. To be sure, the federal habeas corpus statute provides *one* mechanism by which a state might be "haled" into federal court, see Pet. App. 12a; but by its enactment of that statute, Congress did not grant state prisoners license to "hale" the state into federal court *in any way they like*.

Congress, we note, recently considered—but clearly rejected—the creation of a supplemental private cause of action by which death row inmates would have been authorized to contest a state's compliance with proposed reforms of federal habeas procedure. See, *e.g.*, S. 1441, 103d Cong., 1st Sess. (1993) (§8); H.R. 3131, 103d Cong., 1st Sess. (1993) (§306); 139 Cong. Rec. S 10925 (1993). Against that historical backdrop, creation of any similar cause of action by the judiciary would be most "institutional[ly] inappropriate[]." *Lonchar*, 116 S. Ct., at 1301.

Furthermore, allowing habeas petitioners to deviate from the only carefully crafted adjudicative model to receive congressional endorsement would invite equally revolutionary departures from accepted methods of resolving legal disputes that will arise in a great many other contexts wherein concerns for comity and federalism are nearly as great. This much is certain: Under Ashmus's logic (which effectively conditions state officials'

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interest. Pet. App. 13a (citing *Booth*, 940 F. Supp., at 852 n. 3, rev'd, 112 F.3d 139 (CA4 1997)). "'Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity.'" *Booth*, 112 F.3d, at 146 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986)).

right to advocate on their ability to *prevail* in every instance), any disputed issue of federal law that arises in the course of litigation between the state and a private party will be subject to resolution, at the private party's sole option, either (1) by motion in the proceedings to which the dispute relates, or (2) by separate action under *Ex Parte Young* to establish the "right" of the private party to prevail on the point, which judgment is then enforceable by ancillary injunctive relief preventing the state from ever giving expression to its opposing view.[14]

3. *Even if* Ex Parte Young *permitted a separate suit to resolve Chapter 154's application, that suit could not be used to circumvent the procedural limitations attendant to habeas litigation*

As the Ninth Circuit recognized and Ashmus now concedes, a judicial determination of Chapter 154's applicability is attainable in individual habeas proceedings. Pet. App. 12a; Brief in Opposition 7; see also *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1144 (CA9 1989) (illustrating use of "motion for declaratory judgment"). Significantly, however, if Ashmus *had* followed established habeas procedures he would have faced a number of procedural limitations which no doubt displeased him.

14. Neither Ashmus nor the Ninth Circuit has identified any principled basis on which a court might limit the obvious logical implications of the novel "rights-violation" theory underlying this suit. We briefly note that the limiting principle seized upon by the District Court—Death is different—is singularly untenable. That death is different supplies the rationale for demanding, under compulsion of the Eighth Amendment, that the fact-finding process attendant to capital *sentencing* "aspire to a heightened standard of reliability," *Ford v. Wainwright*, 477 U.S. 399, 411 (1996) (plurality opinion of Marshall, J.), but it does not entitle the death row population to any special procedural dispensations in connection with their efforts to wage collateral attacks on their judgments, *Smith v. Murray*, 477 U.S. 527, 538 (1986), much less can it be invoked to bestow upon that population a judge-created civil cause of action enjoyed by no other segment of society.

First, he could not have obtained class certification because that mechanism is "ordinarily disfavored" in habeas practice, *Cox v. McCarthy*, 829 F.2d 800, 804 (CA9 1987); see generally *Schall v. Martin*, 467 U.S. 253, 261, n. 10 (1984), and, more fundamentally, because that device applies to *actions*, Fed. Rule Civ. Proc. 23, not "motions." Accordingly, any ruling adverse to the state that Ashmus alone might have obtained, even a published one, would not have precluded another district court, considering another prisoner's challenge to a California death judgment, from giving effect to its contrary view; indeed, even if a "class motion" were available,[15] a ruling in Ashmus's favor would not necessarily carry preclusive effect in other habeas cases. *Mendoza*, 464 U.S., at 159 (nonmutual offensive collateral estoppel does not operate against the federal government); *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558-1579 (CA11 1985) (extending *Mendoza* protection to the state); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (application of offensive collateral estoppel is discretionary); *Montana v. United States*, 44 U.S. 147, 162-164 and n. 11 (not applicable to "'unmixed questions of law' in successive actions involving substantially unrelated claims," or when "there is reason to doubt the quality, extensiveness, or fairness of procedures

15. Ashmus affirmatively resisted "coordinated or consolidated pretrial proceedings" under 28 U.S.C. §1407, see Record, Doc. No. 4, perhaps because he recognized that Chapter 154's applicability to California cases presented a common question of law rather than fact, or perhaps because assignment of proceedings under that provision would be determined by an impartial judicial panel on multidistrict litigation, §1407(b), not subject to potential manipulation by naming a single class representative plaintiff to whose habeas action the proceedings might then be "related." See Record, Doc. No. 9.

followed in prior litigation"). Finally, even a truly "binding" ruling would, at most, dictate conforming *rulings* at the district court level; it would not preclude the state from *asserting* its opposing view, if only to preserve the issue for further review. See Cal. Rule of Prof. Conduct 3-200 (recognizing propriety of making "a good faith argument for extension, modification, or reversal of . . . existing law"); compare Pet. App. 20a ("Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case").

It is understandable that Ashmus would prefer to avoid these several restrictions on his ability to control the course of his own litigation. But allowing him to use *Ex Parte Young* to achieve that objective was, even assuming that doctrine were not otherwise inapplicable, indisputably improper. *Seminole Tribe*, 116 S. Ct., at 1182-1183) ("[T]hat a state prisoner may circumvent [habeas] restrictions by ostensibly bringing his suit under *Young* rather than 28 U.S.C. §2254 . . . cannot be the law") (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

Remarkably, the District Court expressly acknowledged that its own actions in this case "may constrain" or had perhaps even already "directly affected" the "ability of other co-equal district court judges to decide the issue differently." Pet. App. 60a; see also *id*., at 30a (acknowledging that the issue of Chapter 154 applicability had been raised "in other cases pending before federal courts in California"); *id*. at 34a (referring to the "exercise [of] its equitable powers to enjoin California from *receiving* the benefits" of Chapter 154) (emphasis added). Yet that is precisely the consequence that *Ex Parte Young* prohibits by its own terms. 209 U.S., at 163 ("[T]he right to enjoin . . . a state official . . . does not include the power to restrain a court from acting in any case brought before it"); see generally *Mullis v. United States Bankruptcy Court for the*

Dist. of Nev., 828 F.2d 1385, 1392-1394 (CA9 1987) ("A district court lacks authority to issue a writ of mandamus to another district court"); *Steffel v. Thompson*, 415 U.S., at 480-482 (Rehnquist, J., concurring); cf. *Green v. Mansour*, 474 U.S., at 72-73; *Meese*, 615 F. Supp., at 202, 204-205 (refraining from conduct that "would directly affect the course of the litigation" in other district courts). That a court would attempt to achieve that improper result indirectly by enjoining state officials is profoundly disturbing; more troubling still is the discovery that a court would, in the process, also violate state officials' constitutionally-protected freedom to advocate on behalf of the state's interest in protecting its criminal judgments from collateral attacks. We now turn to the latter subject.

II.

THE INJUNCTION AGAINST STATE OFFICIALS' ADVOCACY VIOLATES THE FIRST AMENDMENT

Ours is an adversarial system, a system "premised on the well-tested principle that truth—as well as fairness—is '"best discovered by powerful statements on both sides of the question."'" *Penson v. Ohio*, 488 U.S., at 84. Essential to the effective operation of such a system is a recognition of the constitutionally-protected freedom of parties to express their views in litigation.

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 4569 (1932).

"The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,'" *In re Primus*, 436 U.S. 412, 432 (1978), and a litigant's rights extend to the "use of established adjudicatory procedures," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). See also *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Courts, like the other arms of government, have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, ..." *Red Lion Broadcasting Co., v. FCC*, 395 U.S. 367 (1969). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-176 (1976). Indeed, because "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do ordinances," they are subject to heightened scrutiny: Even a content-*neutral* injunction will be struck down unless it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S., at 765.

Here, of course, the injunction issued by the District Court and upheld by the Ninth Circuit is anything but "content-neutral": It bars state officials from addressing a particular subject—the application of Chapter 154. Such a regulation "on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984). Even worse, it restricts state officials' speech on that subject in a viewpoint-specific manner: "Had the district

court not issued the injunction, California would have been free to assert in other federal and state proceedings [its] position" that it has complied with those statutory preconditions which entitle it to have Chapter 154 applied; that same injunction, however, leaves state prisoners free to express their contrary view in any court they like—that is, "[i]t excludes one advocate from a forum to which adversaries have unlimited access." *Bolger v. Youngs Drug Product Corp.*, 464 U.S. 60, 84 (1983) (Stevens, J., concurring in the judgment). An injunction of such scope—and having such disparate impact, intentionally so, on participants in the adversarial process—is unprecedented in the annals of American law. And the arguments and rationalizations that have been offered in its defense cannot withstand even minimal scrutiny.

Certainly, one cannot plausibly validate a complete denial of state officials' opportunity to advocate their position "in litigation"—the only context in which legal advocacy could have any effect—by observing that they are "free to voice their opinion" elsewhere. See Pet. App. 21a. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Explaining *outside* the litigation context "that the district court, and [Ninth Circuit], are wrong," *ibid.*, can vindicate none of the state officials' expressive freedoms, for "'[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *NAACP v. Button*, 371 U.S. 415, 437 (1963). "Under our constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969).

Nor can state officials' "fundamental First Amendment right to express their views in th[at] regard" be

curtailed on the theory that "the *manner* in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." Pet. App. 35a (emphasis added). Viewpoints that are "consistently and vigorously maintained," *id.*, at 30a, enjoy as much constitutional protection as those expressed with less fervor. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (cross burning); *Cohen v. California*, 403 U.S. 15 (1971) (display of expletive in courthouse). And the degree of protection afforded to the expression of views can no more turn on their content than on the extent to which an adversary perceives their expression to cause "uncertainty" or any other form of discomfort, including being "put . . . in a very different position" from what might have been the case if the speaker had expressed no opinion or some different opinion more to the audience's liking. See *Boos v. Barry*, 485 U.S. 312, 321 (1988). Certainly, the government's "urgent wish to avoid controversy which might result from . . . expression" provides no basis for suppressing that expression. *Tinker*, 393 U.S., at 510. Indeed, it would be a curious jurisprudence that offers First Amendment protection to flag burners, cross burners, and those who enter courthouses wearing jackets emblazoned with profanity, but denies it to state officials who, in defending presumptively valid criminal convictions from collateral attacks, seek to share with the federal courts their views on a question of federal law.

Our constitution also will not permit one court's fear of another court's "divergent" opinion to defeat a litigant's right to advocate its position. See Pet. App. 13a. Entertaining parties' competing requests for favorable rulings on issues of law is not "basically incompatible with the normal activity" of courts, *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), and if a court's ultimate ruling happens

to "diverge" from an earlier one issued by some different court, it does not "inherently threaten[] the judicial process," *Cox v. Louisiana*, 379 U.S. 559, 566 (1965). See also *Riley*, 302 U.S., at 299. If ever the state of the law truly compels rejection of a legal proposition, our courts can be expected to act in accordance with the law's command; however, for one court to suggest that it needs to shelter all other courts from even *hearing* advocacy *it* believes to be "erroneous," lest those other courts succumb to the temptation to "err" in their rulings, is to demean the judicial process itself. Quite simply, no branch of government has authority to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). In addition to being a content-based, viewpoint-specific restriction on protected expression, a one-sided ban on advocacy that serves to "avoid" divergent opinions "in any state or federal proceedings," Pet. App. 3a, 13a, is an impermissible prior restraint of First Amendment freedoms as well. *City of Madison*, 429 U.S., at 177; see *Madsen*, 512 U.S., at 763 n. 2. And putting its unconstitutionality to one side, such an injunction can only have disastrous consequences for the *quality* of the judicial decisionmaking process.

"[T]horough development of legal doctrine," we think, is best accomplished "by allowing litigation in multiple forums." *Mendoza*, 464 U.S., at 163. Indeed, "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication . . . ." *Alderman v. United States*, 394 U.S. 165, 184 (1969). Rarely will "thwarting the development of important questions of law by freezing the first final decision rendered on a particular legal issue" be a prudent approach, *Mendoza*, at 160; and following that disfavored course when, as here, initial resolution of the issue occurred "under severe time constraints," Pet. App. 22a, will only enhance the risk of

serious adjudicative error, as this case so vividly illustrates: Had the Ninth Circuit not been spared the distracting effects of "divergent district court opinions," *id.*, at 13a, it might have realized, for example, that state officials are not the agency that selects the law under which "federal *review* of . . . habeas petitions" occurs, *id.*, at 10a, and thus ordered these proceedings terminated under compulsion of the Eleventh Amendment; alternatively, and assuming the Ninth Circuit were otherwise determined to reach the question of Chapter 154's application, the court's resolution might not have proceeded on the wholly erroneous assumptions that states appoint counsel for federal proceedings, that Chapter 154 contains a deadline for the appointment of state counsel, or that delays in the appointment of state counsel will cause prisoners to be "without counsel" during any portion of the 180-day filing deadline for federal petitions, to take just three more examples.

Congress mandated that Chapter 154 go into effect immediately. For the sake of avoiding "divergence," however, the instant injunction has effectively blocked the implementation of Chapter 154 in California since its enactment. That there was ever any risk of "divergent" opinions, of course, simply shows that Chapter 154's application in California is, at the very least, an issue over which reasonable minds might differ. Ashmus's own confessions of "uncertainty" about his position only confirm the point. And the reason the prospect of "divergence" would endure to this day—were it not for the injunction—is distressingly clear: Grave and multiple errors (only a few of which we have touched upon at this stage) infect the decisions of the District Court and Ninth Circuit alike. Whatever the value of injunctions in other contexts, the constitution forbids their use for the benighted purpose of permanently insulating judicial error from

those regular legal processes by which it can be identified, scrutinized, and ultimately corrected.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded to that court with directions that the action be dismissed by the District Court.

Respectfully submitted,

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No. 97-391

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General,

Petitioners,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the Eleventh Amendment does not bar an action to determine whether the State of California is entitled to the benefits of Chapter 154 where State officials' threats to invoke Chapter 154 deprived habeas petitioners of "their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q)," *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997), and where the State concedes that such a determination could be made in an individual habeas proceeding without offending the Eleventh Amendment?

2. In effectuating its declaratory judgment, did the District Court properly invoke its inherent authority to enjoin State officials from asserting that the State of California has qualified under the provisions of Chapter 154 and require the parties to this action to litigate the application of Chapter 154 in one forum?

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STATEMENT OF THE CASE

A. THE OCCASION FOR THIS LAWSUIT

On April 24, 1996, President Clinton signed the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996), amending provisions in Chapter 153 and creating a new Chapter 154 of the Judicial Code, codified at 28 U.S.C. sections 2261-2266. The new Chapter 154 provides expedited procedures and a more limited scope of federal review of capital cases in States that guarantee death-sentenced prisoners the appointment of competent counsel and the litigation resources necessary to develop constitutional claims in state habeas proceedings. 28 U.S.C. §§ 2261, 2265. The procedural benefits accorded States that fulfill the requirements of Chapter 154 include the following:

1. Statute of Limitations. Death-sentenced prisoners have only 180 days following state direct review to file a federal petition. 28 U.S.C. § 2263(a).

2. Expedited Procedures for Consideration of Habeas Petitions. The district court must issue a final decision within 180 days after the filing of the petition, during which time the parties have 120 days to complete all proceedings in the case, including an evidentiary hearing. The court of appeals is required to issue its decision within 120 days after the filing of the reply brief. 28 U.S.C. § 2266.

3. Limits on Amendments. Once the State answers the petition, any amendment is treated as a successor petition. 28 U.S.C. § 2266(b)(3)(B).

> 4. Limitations on the Issuance of Stays of Execution. The petitioner has no right to a stay of execution to obtain appellate review of the denial of relief, and "no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application." 28 U.S.C. §§ 2262(b)(3), (c).

If a State does not comply with the requirements of Chapter 154, death-sentenced prisoners are entitled to review of their federal habeas petitions in accordance with the procedures contained in Chapter 153. *See, e.g., Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2063 (1997) (Chapter 154's "special rules favorable to the state party" "applicable only if the State meets certain conditions").

Prior to and after the enactment of the AEDPA, the Attorney General of the State of California and his agents (hereafter "State officials") issued press releases and made numerous official public announcements threatening to invoke the provisions of Chapter 154. *See, e.g., Ashmus*, 935 F. Supp. 1048, 1056 (N.D. Cal. 1996), *reprinted in* Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") 30a-31a (finding that State officials "have consistently and vigorously maintained that California qualifies for Chapter 154's benefits" and have "threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class"); Exhibits in Support of Application for Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief, filed April 24, 1996, Exhibit 3 (hereafter "Exhibit 3"). Moreover, the State officials insisted that because Chapter 154 applied retroactively under AEDPA

section 107(c), these provisions were immediately effective in cases pending in federal court as well as all future federal habeas proceedings. *See, e.g., Ashmus*, 935 F. Supp. at 1060, Pet. App. 39a-40a; Exhibit 3.

In light of the significant differences between the expedited procedures in Chapter 154 and those in Chapter 153, the State officials' statements and subsequent attempts to invoke Chapter 154 created substantial uncertainty and concern about which procedures would govern pending and future federal habeas proceedings. For death-sentenced prisoners, the uncertainty of whether Chapter 154 applied created an untenable dilemma: they could either gamble that Chapter 154 did not apply and let its limitations period expire without filing proceedings that were necessary to preserve their right to federal judicial review of their constitutional claims if it did, or they could attempt to comply with Chapter 154's time limitations and risk jeopardizing the merits of their claims by filing federal proceedings without adequate preparation or the quality of representation that Congress has sought to assure as a precondition for imposing the limitations.

To obtain an expeditious, uniform determination regarding the applicability of Chapter 154, Troy Ashmus commenced this action on behalf of all California death-sentenced prisoners (hereafter "class members"). Joint Appendix (hereafter "J.A.") 2-18. The complaint alleged that the State officials' claimed entitlement to the benefits of Chapter 154 violated federal law, created a climate of confusion, and sought to secure the benefits of that chapter without the State having satisfied its requirements of providing competent counsel and litigation resources in

State postconviction proceedings. J.A. 3-5, 13-17. The class members invoked the District Court's jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343(a)(3). J.A. 6. The complaint and accompanying application for equitable relief sought a declaration that California did not qualify for Chapter 154's benefits and an injunction prohibiting the State officials from maintaining otherwise. J.A. 17-18.

Following commencement of this action but prior to the issuance of a temporary restraining order, the State officials carried through on their threats by claiming entitlement to Chapter 154 procedures in several pending capital habeas proceedings. *See, e.g., Ashmus*, 935 F. Supp. at 1056, Pet. App. 30a. They created further uncertainty by asserting confusing and inconsistent positions regarding which habeas petitioners they believed were subject to Chapter 154's provisions.[1]

[1] The record before the District Court demonstrated that the State officials advocated three different interpretations of how Chapter 154 applied to capital habeas petitioners. In one case, the State officials asserted that the capital habeas petition was barred on April 24, 1996, because Chapter 154's statute of limitations applied retroactively. Exhibits in Support of Reply to Opposition to Application for Temporary Restraining Order & Temporary Declaratory Relief, filed May 1, 1996, Exhibit 6 at 14. In the District Court, the State officials initially asserted that Chapter 154 applied to all California death-sentenced prisoners, but that the statute of limitations began to run on April 24, 1996. Memorandum of Points and Authorities in Opposition to Application for Temporary Restraining Order & Temporary Declaratory Relief, filed April 29, 1996, at 2-3. The State officials later amended their position to assert that Chapter 154 does not apply to any death-sentenced prisoner whose judgment was affirmed by the California Supreme Court prior to June 6, 1989.

At the time of the State officials' actions, 439 death-sentenced prisoners were affected by the potential applicability of Chapter 154 to federal capital habeas proceedings. The 387-member plaintiff class certified by the District Court consisted of all individuals who were sentenced to death by California courts, except the 52 persons whose judgments were affirmed prior to June 6, 1989, and for whom the State officials conceded Chapter 154 did not apply. *Id.* at 1063-1069, Pet. App. 48a-61a. It included more than 130 persons who were before the California Supreme Court "without counsel and likely to remain so for some time." *Id.* at 1055, Pet. App. 27a.

B. DISTRICT COURT PROCEEDINGS

Finding that the class of death-sentenced plaintiffs faced irreparable injury without a prompt judicial determination of the law governing federal habeas proceedings, *id.* at 1056, 1075-1076, Pet. App. 31a, 77a-78a, the District Court expedited consideration of the procedural and substantive issues in this case. Finding a significant likelihood that plaintiffs would prevail on the merits, plaintiffs will suffer irreparable injury, and the balance of hardship favored plaintiffs, the District Court issued a temporary restraining order prohibiting the State officials from "asserting that the state of California has complied with or is entitled to the benefits of the provisions of new Chapter 154 of Title 28, United States Code, in any state or federal proceedings involving any prisoners under

Exhibits in Support of Reply to Opposition to Application for Temporary Restraining Order & Temporary Declaratory Relief, filed May 1, 1996, Exhibit 7 at 5 n.3.

sentence of death by the State of California." J.A. 22. Without mentioning the Eleventh Amendment defense now raised in this Court, the State officials unsuccessfully sought mandamus relief from the temporary restraining order in the Ninth Circuit and this Court. *See Ashmus*, 935 F. Supp. at 1058, n.10, Pet. App. 36a n.10.

On May 15, 1996, the District Court extended the temporary restraining order for an additional ten days to permit "a carefully considered decision," minimize "duplicative litigation over, and ensur[e] expeditious review of, the applicability of Chapter 154 to California." J.A. 25-26. In response to the State officials' First Amendment concerns, the District Court modified the temporary restraining order to prohibit the State officials from "trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154." J.A. 26.

On May 23, 1996, the District Court conducted a hearing on the class members' application for declaratory and injunctive relief. Following the hearing, the court concluded that the class members were entitled to a declaratory judgment that California failed to qualify for the benefits of Chapter 154 and an injunction preventing the State officials from trying or seeking to obtain those benefits. The court issued a preliminary written order of its findings and conclusions the next day. J.A. 29-43. The District Court supplemented its factual findings and conclusions of law in an order issued on June 14, 1996. Pet. App. 25a-80a.

The District Court concluded that the class members had satisfied all jurisdictional requirements to maintain this action.[2] It held that it had subject matter jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343(a)(3); each member of the plaintiff class had suffered actual injury as a result of the State officials' incorrect assertions regarding Chapter 154 and therefore satisfied Article III's standing requirement; the issue of California's compliance with Chapter 154's requirements was ripe for decision; and plaintiffs stated a cause of action under the Declaratory Judgment Act, 28 U.S.C. section 2201, and under 42 U.S.C. section 1983.[3] *Ashmus*, 935 F. Supp. at 1059-1063,

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[2] The District Court did not address the Eleventh Amendment in its order. Although the State officials had initially raised an issue of Eleventh Amendment immunity in their opposition to the application for a temporary restraining order, *see* Memorandum of Points and Authorities in Opposition to Application for Temporary Restraining Order and Temporary Declaratory Relief, filed April 29, 1996, at 6-7, they did not invoke the defense during the declaratory judgment and preliminary injunction proceedings. At no time following the proceedings on the temporary restraining order did the State officials mention the Eleventh Amendment until they filed their answer, which was *after* the District Court had issued its initial declaratory judgment order.

[3] The lower courts concluded that the class members' dispute presented an actual case or controversy and properly invoked federal question jurisdiction pursuant to 28 U.S.C. section 1331, and thus the entry of a declaratory judgment was proper. *Ashmus*, 123 F.3d at 1199, 1026 (9th Cir. 1997), Pet. App. 14a-16a; *Ashmus*, 935 F. Supp. at 1059-1063, Pet. App. 37a-48a; *see also McGrath v. Kristensen*, 340 U.S. 162, 169 (1950). In their Brief before this Court, the State officials question whether the Declaratory Judgment Act created a "cause of action," Pet. Brief 22 n.6, and whether the existence of "[t]he comprehensive

Pet. App. 37a-48a. The court also concluded that the requirements of Federal Rule of Civil Procedure 23 were satisfied, and it certified a class consisting of "all persons who have been sentenced to death by the State of California and are currently awaiting execution pending resolution of their state and federal challenges to their state convictions and sentences, except those such persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989." *Id.* at 1063-1069, Pet. App. 48a-61a.

The District Court then analyzed the AEDPA and the State officials' assertions that California had promulgated the requisite mechanism qualifying the State for Chapter 154's benefits in habeas proceedings brought by class members. The court made explicit findings that, contrary to Chapter 154's requirements, California (1) does not have any statute or rule establishing a mechanism for the appointment and compensation of habeas counsel, *id.* at 1072-1074, Pet. App. 69a-75a; (2) does not permit appointed counsel to pursue any habeas claims other than those that appear within the "four corners" of the appellate record, *id.* at 1070-1072, Pet. App. 65a-69a; (3) does not have any enforceable, articulable competency standards governing appointment of capital habeas counsel, *id.* at 1072-1074, Pet. App. 69a-75a;[4] and (4) has a backlog of

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remedial character of the habeas scheme" precludes a suit pursuant to 42 U.S.C. section 1983. Pet. Brief 35 n.12. These questions are not properly before this Court because the State officials did not seek *certiorari* review of them.

[4] In addition to concluding that California lacks any binding or mandatory qualification standards for appointment of counsel in capital cases, the District Court concluded that

over 130 unrepresented prisoners, some of whom have been waiting four years for the appointment of counsel just to begin the capital appeals process, *id.* at 1055, 1074-1075, Pet. App. 27a-28a, 75a. Reasoning that the expedited procedures of Chapter 154 were part of a *quid pro quo* that California failed to satisfy, the Court concluded that the State officials were not entitled to invoke the new, beneficial procedures. *See id.* at 1069, 1075, Pet. App. 62a, 76a-77a.

Finally, the District Court considered the remedy appropriate to protect the class members' rights. The court concluded that, unless it ordered effective relief, the State officials would continue to intimidate class members into complying with Chapter 154 by wrongly asserting that California was entitled to Chapter 154 procedures despite the District Court's contrary ruling. *Id.* at 1075-1076, Pet. App. 77a-78a. The necessity for declaratory and injunctive relief was supported by the District Court's extensive, and unchallenged, factual findings about the nature and effect of the State officials' conduct. The court addressed the State officials' First Amendment concerns by finding that, in the absence of a

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Chapter 154 requires that such qualifications include "experience or competence in bringing habeas petitions." *Ashmus*, 935 F. Supp. at 1074, Pet. App. 73a-74a. The Ninth Circuit concluded that Chapter 154 does "not require previous experience in habeas corpus litigation." *Ashmus*, 123 F.3d, at 1208, Pet. App. 19a. In all other respects, the Ninth Circuit affirmed the District Court's factual findings and legal conclusions regarding the applicability of Chapter 154 to California death-sentenced prisoners. *Id.* at 1207-1208, Pet. App. 18a-20a.

binding determination that Chapter 154 is inapplicable to California, the threats to invoke Chapter 154 in future proceedings forced death-sentenced habeas petitioners to comply with the provisions, thus "secur[ing] for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits." *Id.* at 1057, 1058, Pet. App. 32a, 35a.[5] The District Court issued a declaratory judgment and preliminarily enjoined the State officials from seeking to obtain the benefits of the new provisions. *Id.* at 1075-76, Pet. App. 76a-79a.

C. THE APPEAL

On appeal, the State officials argued, *inter alia*, that the action was barred by the Eleventh Amendment. A divided panel of the Court of Appeals concluded that this

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[5] *See also Ashmus*, 935 F. Supp. at 1057, Pet. App. 32a ("Defendants' statements during the course of this litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions."); *id.* at 1056, Pet. App. 31a ("The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights."); *id.* at 1058, Pet. App. 34a-35a ("[A]s a factual matter, the Court finds that defendants' threats have caused plaintiffs to forgo their statutory rights and that, absent relief from this Court, defendants' threats will continue to cause such injury. . . . "); *id.* at 1059-60, Pet. App. 39a.

action fell within the exception to Eleventh Amendment immunity established by *Ex parte Young*, 209 U.S. 123 (1908). *Ashmus*, 123 F.3d at 1204-1205, Pet. App. 9a-13a. The court held *Young* controlling because the case at bar fit the classic *Young* mold of a suit seeking only prospective relief against state officials to ensure compliance with federal law and to protect the class members' federal rights. *Id.* at 1205, Pet. App. 12a (until the State complies with Chapter 154 requirements, "it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28"). The Ninth Circuit found that:

> The plaintiffs . . . have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements . . . threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q). *Id.* at 1204, Pet. App. 10a.

The Court of Appeals further concluded that permitting this litigation would "have little, if any, impact on the State's sovereign interests." *Id.* at 1205, Pet. App. 12a. Noting that a determination of the applicability of Chapter 154 could be made in any habeas proceeding without offending the Eleventh Amendment, the court concluded that resolving the issue in a single unified action worked no intrusion on the State's sovereignty:

> California is not complaining about being haled into federal court to determine whether it qualifies under Chapter 154. Instead, California argues the appropriate procedure for resolving

> this dispute is to litigate the issue in each individual federal habeas proceeding, rather than in this single universal action. Whether the issue is resolved in this action or in separate individual habeas proceedings, California acknowledges the issue will be resolved by a federal court into which it will be haled, if not willingly at least resignedly. *Id.* at 1205, Pet. App. 12a.[6]

The Court of Appeals then examined the State officials' claims that California qualified for special treatment pursuant to Chapter 154. Like the District Court, the Court of Appeals concluded that California did not, and it affirmed the grant of declaratory judgment and injunctive relief to effectuate that judgment. *Id.* at 1207-1209, Pet. App. 16a-21a. The Court of Appeals concluded that the injunction did not interfere with the State officials' First Amendment rights, but rather merely prevented them from relitigating the legal question decided against them. *Id.* at 1209, Pet. App. 21a. The court clarified that the injunction applies to the "current state of California law," and that it may be modified by the District Court "depending upon future events." *Ibid.*

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[6] Since the granting of *certiorari*, the Eleventh Circuit similarly has concluded that the Eleventh Amendment does not bar an action seeking to prevent State officials from wrongfully asserting entitlement to Chapter 154 benefits. *Hill v. Butterworth*, ___ F.3d ___, 1997 WL 767352 *2-3 n.7 (11th Cir. Dec. 15, 1997).

SUMMARY OF ARGUMENT

The State officials' entire Eleventh Amendment argument rests on two contentions. *See* Pet. Brief 23 (summarizing the two points). One is that in order to be subject to suits permitted by the Eleventh Amendment under the doctrine of *Ex parte Young*, a state officer must either "violate" or "enforce" federal law and must do so in the special sense of either *single-handedly bringing about results* forbidden by federal law or *threatening to "commence" legal proceedings* that will produce such results. *See* Pet. Brief 24, 26-31.

Nothing in this Court's jurisprudence supports such a crabbed view of the *Young* doctrine. The principle of *Young*, repeatedly approved and applied in subsequent cases, is that when state officers act in ways that threaten to defeat the execution of federal law, they go beyond the sphere of immunity that the States enjoy under the Eleventh Amendment, and they can therefore be sued in federal court in order to effectuate the paramount authority of federal law under the Supremacy Clause. In this case, California officials were found to be interfering with the execution of the AEDPA by intimidating death-sentenced inmates into forfeiting procedural protections carefully erected by Congress, with the result that the officials could reap the benefits of Chapter 154 without bearing the obligations on which those benefits were conditioned under the federal statutory structure. This exposed the State officials to declaratory and injunctive relief under familiar principles with which they have prudently declined to take issue in the petition for *certiorari*, and it is more than sufficient to bring them within the settled scope of *Ex parte Young* and its progeny.

The State officials' second Eleventh Amendment contention is that *Young* permits an equitable suit only when that particular form of action is "necessary" due to an absence of alternative federal remedies. *See* Pet. Brief 23. They assert that because California death-sentenced inmates can litigate the applicability of Chapter 154 in the context of individual habeas corpus cases, declaratory and injunctive relief are precluded. *See* Pet. Brief 20-21, 32-41.

This submission, which would turn the Eleventh Amendment from a rule of immunity into a set of rules about priorities among particular causes of action and forms of relief, is unsupported by either precedent or principle. Under both, the only question of "necessity" that arises in applying the Eleventh Amendment doctrine of *Ex parte Young* is whether the exertion of federal jurisdiction is needed to prevent a State officer from interfering with the implementation of federal law or the exercise of federal rights. Once federal jurisdiction is properly invoked – under the various requirements for declaratory and injunctive relief that the courts below found were met in the present case and that have not been put in issue by the State officials' petition for *certiorari* here – the choice of remedies is not constrained by the Eleventh Amendment.

The State officials' contention that declaratory and injunctive relief are foreclosed by the First Amendment is similarly flawed. The District Court's injunction merely prevents those officials from attempting to obtain the benefits of Chapter 154 unfairly through the use of duplicative litigation and threats. The *quid pro quo* offered by Chapter 154 is a systemic benefit designed to apply, if at

all, to a state jurisdiction as a whole. Requiring the State officials to present their arguments regarding Chapter 154 in one forum and binding them by the resulting judicial determination is not a novel exercise of a court's authority or a violation of any State official's rights.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION.

Whether Chapter 154's procedures govern federal habeas proceedings in California is indisputably a question of grave importance to over 400 death-sentenced prisoners, the federal judiciary, and State officials. At a minimum, the application of Chapter 154 would require the District Courts in California to dramatically reorder their dockets so as to issue expedited decisions in all of the approximately 145 pending cases and would require the Court of Appeals to rush to decide every appellate issue in all of these cases within 120 days after the filing of the reply brief. Application of the new procedures would also cut in half the time that is otherwise available for appointed counsel to perform the tasks necessary to provide the professional representation to which all death-sentenced prisoners are entitled under federal law.

The applicability of Chapter 154's procedures is also a question that, by the very terms of the chapter, must be determined on a systemic, state-wide basis. *See, e.g.*, 28 U.S.C. §§ 2261(b), (c) (Chapter 154 is applicable only if the State establishes a qualifying mechanism that offers

counsel to all State prisoners under capital sentence). As the State officials acknowledged, the State's entitlement to the benefits of Chapter 154 is "a question of law. It's [sic] has California implemented a qualifying mechanism. And in order to determine that, you look at the enabling legislation- . . . . California qualifies or not." Reporter's Transcript of May 3, 1996 Proceedings, at 4; *see also* Supplemental Briefing Per Order of May 15, 1996, filed May 17, 1996, at 7 ("general applicability of Chapter 154 in California does not turn on such case-specific matters").

Absent a definitive judicial answer to the question whether "California qualifies or not," capitally-sentenced inmates were faced with two untenable choices: either proceed as if Chapter 154 did not apply and thereby risk the forfeiture of potentially meritorious claims against their convictions and death sentences if the time limitations of Chapter 154 were later found to be applicable; or attempt to comply with those stringent limitations, and thereby forego full investigation and adequate factual and legal development of their constitutional claims. The Declaratory Judgment Act was enacted precisely because this kind of "choice" poses a "dilemma [into which] no civilized legal system operating under a constitution should force any person." *Steffel v. Thompson*, 415 U.S. 452, 468 n.18 (1974) (quoting Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong. 1st Sess. 75-76 (1928)); *see also Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974).

Thus, the class members sought declaratory relief as an expeditious and uniform means of resolving the applicability of Chapter 154. The resulting determination –

after extensive briefing, hearings, and judicial fact-finding – that California did not qualify for Chapter 154's procedures enables all litigants and courts to proceed with decision-making informed by an awareness of the applicable rules and consequences. As in *Young*, this lawsuit is "undoubtedly the most convenient, the most comprehensive, and the most orderly way in which the rights of all parties can be properly, fairly, and adequately passed upon." 209 U.S. at 166.

Although the State officials recognize the importance of deciding Chapter 154's applicability and concede that this is a question for a federal court to decide, they maintain that only this Court may render a definitive ruling on the issue and only after some final habeas corpus judgment comes here for review. Until then, the officials claim they are entitled to enjoy "divergent" answers to the question so that California capital habeas cases are litigated under a chaotic regime in which the State is deemed both to qualify and not to qualify for Chapter 154's benefits. Pet. Brief 44. The officials claim they are entitled to avoid a uniform determination of habeas litigants' rights by virtue of the guarantee of sovereign immunity.

The State officials' Eleventh Amendment argument is premised on a restrictive view of the *Young* doctrine that has no support in this Court's jurisprudence. For the past ninety years, the *Young* doctrine has permitted equitable suits to be brought against State officials to prevent continuing violations of federal law or to ensure the supremacy of federal law. As this Court has recognized, the Eleventh Amendment does not prohibit suits against state officials "to permit the federal courts to vindicate federal

rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160).

A. THE *YOUNG* DOCTRINE APPLIES BECAUSE THIS LITIGATION SERVES TO RECTIFY AN ONGOING DISREGARD OF FEDERAL LAW BY STATE OFFICIALS AND TO ENSURE THAT THEY COMPLY WITH FEDERAL LAW.

This lawsuit seeks a declaration that California has not satisfied the prerequisites – including the timely provision of competent counsel and litigation resources – to qualify for the benefits of the expedited, preferential habeas procedures that Chapter 154 enacts. The lawsuit thereby seeks to end a chaotic situation in which State officials take advantage of the confusion generated by their unfounded claims that they are in compliance with Chapter 154 and entitled to its benefits, so as to enjoy these benefits in contravention of federal law. The District Court found that the State officials' assertions that California has satisfied the requirements of Chapter 154 are factually and legally incorrect; that their erroneous assertions were creating confusion and coercing habeas petitioners to follow Chapter 154's abbreviated timetables without the State providing the compensating legal services and resources required by the statute; and, as a result, that the State officials' actions were thwarting the aims of Congress in enacting the AEDPA. *Ashmus*, 935 F. Supp. at 1056-1058, 1070-1075, 1075-1076, Pet. App. 31a-35a, 65a-75a, 78a. A majority of the Ninth Circuit panel agreed. *Ashmus*, 123 F.3d at 1204, 1207-1209, Pet.

App. 10a-13a, 16a-20a. The sole effect of the rulings below is to ensure that these officials comply with Chapter 154 either by satisfying its prerequisites or by refraining from making wrongful claims that give them the advantage of the chapter's expedited habeas procedures without legally deserving them.

Where, as here, a lawsuit seeks to enforce a state official's future compliance with federal law, the Eleventh Amendment does not apply. "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. at 160-162). Indeed, this Court recently reaffirmed that the *Young* exception permits suits to ensure that state officers' conduct "is in compliance with federal law." *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1131 n.14 (1996); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S. Ct. 2028, 2038 (1997) (principal opinion of Justice Kennedy) ("where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity."); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (Under *Young*, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to

the requirements of federal law."). Because *Young* vindicates the supremacy of federal law, federal courts have the power to require state officials to conform their conduct to federal statutory, as well as constitutional, law. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

The State officials contend that *Young* applies only when a state officer has the power to "commence" proceedings or to enforce or invoke state law that is in conflict with federal law. Pet. Brief 26. This view of the *Young* doctrine is not supported by any decision of this Court.[7] To be sure, the Court has applied *Young* to permit lawsuits which alleged that state officers had undertaken or threatened to undertake litigation that was inconsistent with federal law. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Ex parte Young*, 209 U.S. at 156. But this Court has never held or even hinted that *Young* is limited to these circumstances, and such a

[7] The officials' suggestion that they are not "commencing" any action inimical to the class members' federal rights incorrectly assumes that Chapter 154 is self-executing. The application of Chapter 154's provisions in federal habeas proceedings may be waived by a State. *Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35, 36 (3d Cir. 1997); *Burris v. Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (en banc). Thus, Chapter 154 may not be applied without the officials first raising its application. *Cf. Trest v. Cain*, ___ U.S. ___, 118 S. Ct. 478, 480 (1997) (federal court not required to decide whether procedural default defense applies where state officials failed to assert the defense). Even if a court *sua sponte* raises the applicability of Chapter 154, the State has the burden of demonstrating that it has met the requirements of that Chapter.

limitation would be incoherent with the rationale of *Young*.[8]

Young stands squarely on the principle that the Eleventh Amendment may not be used to shield review of the actions of State officials that interfere with federal rights or interests. This is so because the States cannot authorize their officers to impede federal law – either constitutional or statutory – consistently with the Supremacy Clause. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985) (application of the *Young* doctrine "gives life to the Supremacy Clause"). It is thus well-established that the Eleventh Amendment does not bar suits against state officials to declare the meaning of federal law with which they must comply. *See, e.g., Coeur d'Alene*, 117 S. Ct. at 2036 (noting that *Young* applies "when the case calls for the interpretation of federal law") (principal opinion of Justice Kennedy). Although state officials may assert that they *are* complying with federal law, the *Young* doctrine permits a

[8] The State officials' attempt to impose a "commencement" or "enforcement" requirement on the Eleventh Amendment stems from their confusion about how *Ex parte Young* operates as an exception to the sovereign immunity defense. *Young* and its progeny did not create a separate and independent cause of action, entitling plaintiffs to relief. Instead, the *Young* doctrine serves to overcome an Eleventh Amendment defense in certain cases that are otherwise properly brought before the federal courts to vindicate violations of federal rights. Justiciability questions such as whether the plaintiffs have a cause of action against the State officials sued, and whether it is ripe, are important ones, but are distinct from a *Young* analysis. The lower courts thoroughly analyzed and resolved the justiciability questions against the State officials. As these issues were not raised in the Petition for Certiorari, they are not before this Court.

federal court to review challenges to their interpretation of the federal law.[9]

The State officials' argument that their conduct cannot constitute a "violation" of federal law ignores the District Court's undisputed factual findings of the consequences of the State officials' conduct. The District Court found – and the State officials do not dispute – that their assertions that California has satisfied the prerequisites of Chapter 154, when it in fact has not, obtains for the State the benefits of Chapter 154 without the State ever having to provide the reciprocal services and safeguards required by Congress under the AEDPA. *See, e.g., Ashmus*, 935 F. Supp. at 1056-58, Pet. App. 31a-35a. Congress explicitly provided that State officials are not entitled to the benefits of Chapter 154, including the ability to demand accelerated federal court procedures in capital cases, unless a State has first ensured that competent counsel with adequate resources are assigned to prepare each case in State court.[10] The State officials' actions

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[9] *See, e.g. Mont v. Heintz*, 849 F.2d 704, 709 (2d Cir. 1988); *Exxon Corporation v. Fischer*, 807 F.2d 842, 845 (9th Cir. 1986), *as amended*, 817 F.2d 1429 (9th Cir. 1987); *Barnes v. Cohen*, 749 F.2d 1009, 1018-1019, 1020 n.7 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); *Helms v. McDaniel*, 657 F.2d 800, 806 n.10 (5th Cir. Unit B 1981).

[10] The State officials essentially admit that their objective is to procure the benefits of Chapter 154 without regard to its eligibility requirements when they argue that federal habeas petitioners can eliminate any uncertainty over Chapter 154 by complying with the chapter's timetables until the question is finally resolved, presumably by this Court. Although, at some future date (after the era of the "divergent" opinions that the State officials hope to promote for a while, Pet. Brief 44), the

therefore thwarted the objectives of Congress in enacting the AEDPA, deprived the class members of their rights guaranteed by Chapters 153 and 154, and fell within the *Young* exception. Because the State officials threatened to act in contravention of federal law, habeas petitioners given rights by that law are entitled to vindicate the law's supremacy by filing suit for equitable relief in federal court. *See, e.g. Shaw*, 463 U.S. at 96 n.14; *Ex parte Young*, 209 U.S. at 160.[11]

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class members may each obtain judicial decisions holding that the officials misinterpreted Chapter 154 all along, those holdings will do nothing to ameliorate the harm inflicted in the interim.

[11] The State officials further contend that their threats to invoke Chapter 154's limitations inflict no harm on habeas petitioners without a federal court ruling that adopts the officials' legal conclusions. Pet. Brief 27, 28. This argument confuses justiciability concerns, which are not within the scope of the officials' *certiorari* petition, with the sovereign immunity issue that is. The State officials' actions and the harm caused by those actions are directly relevant to any number of justiciability concerns. For example, the District Court addressed whether the officials' conduct was sufficiently injurious to create an actual case or controversy that would be redressed by a favorable decision. *Ashmus*, 935 F. Supp. at 1059-1060, Pet. App. 37a-40a. The District Court also examined the extent of the harm inflicted by the State officials' conduct in determining whether the dispute between the parties was sufficiently developed for and worthy of adjudication and thus satisfied the ripeness doctrine. *Id.* at 1060-1061, Pet. App. 40a-43a. Similarly, the District Court determined whether the State officials' actions gave rise to a cognizable cause of action. *Id.* at 1061-1063, Pet. App. 43a-48a. The District Court thoroughly addressed each of these justiciability concerns; the State officials did not raise them in the Petition for Writ of Certiorari; and they are not matters that can be smuggled into an Eleventh Amendment defense.

Not only do the State officials misconstrue *Ex parte Young*, but they fail to identify any constitutional purpose or concern that would be served by their proposed narrowing of the *Young* doctrine. They decry the Ninth Circuit's decision as a gross affront to the State's sovereignty; yet they never explain precisely how California's sovereign interests are more appreciably affected by this litigation than if the State had been required to respond to motions for rulings on the applicability of Chapter 154 in the approximately 145 habeas cases currently in federal court. In determining the "scope and application of *Ex parte Young*," this Court has sought to ensure that sovereign immunity remains meaningful while preventing violations of federal law, *Coeur d'Alene*, 117 S. Ct. at 2034. Here, the class members' request that the federal court interpret a federal statute implicates no state sovereignty interests.[12] The right to control federal

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[12] The State officials' current position that they are entitled to conduct piecemeal litigation of a question common to all class members is inconsistent with their approach in the Ninth Circuit. Until the Ninth Circuit rejected the State officials' view of Chapter 154, the State officials had urged the court to resolve the dispute in a manner that eliminated the possibility of obtaining "divergent opinions" about the applicability of Chapter 154. Following the decision in *Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, No. 97-5623, the State officials urged the Ninth Circuit to order the District Court to rule in Mr. Ashmus's habeas proceeding on a declaratory judgment motion based on the pleadings and records in this case and expedite an interlocutory appeal from the ruling. Appellants' Supplemental Responsive Brief at 14-15. Had the Court of Appeals followed the State officials' suggestion, the same panel would have resolved the same legal issues on the same record presented in this case, all without changing the ultimate result or the effect on the State's sovereignty.

dockets, deprive habeas petitioners of their federal rights to judicial review of constitutional issues, and prevent the orderly administration of federal procedures are not "essential attribute[s] of sovereignty." *Id.* at 2041.

This Court has recognized limited exceptions to the *Young* doctrine where there is a "real affront to a State of allowing a suit to proceed." *Id.* at 2038 (principal opinion of Justice Kennedy). In actions against state officials, the State has an interest "whenever state policies or procedures are at stake." *Id.* at 2034. State interests thus are implicated when a federal court is asked to preclude the enforcement of a state statute or administrative procedure, or enjoin pending criminal proceedings, *see, e.g., Coeur d'Alene*, 117 S. Ct. at 2037-2038 (principal opinion by Justice Kennedy); where the action against the State was "the functional equivalent of a quiet title action which implicates special sovereignty interests," *see, e.g., id.* at 2040; where the action is "in essence one for the recovery of money from the state," *Edelman*, 415 U.S. at 663 (quoting *Ford Motor Co. v. Dept. Of Treasury of Indiana*, 323 U.S. 459, 464 (1945)); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994); or where the action seeks to force state officials to conform their conduct to state law, *Pennhurst*, 465 U.S. at 106.

But this suit does not implicate any such interests, nor does it seek the "far-reaching and invasive relief" sought by the plaintiffs in *Coeur d'Alene*, 117 S. Ct. at 2040. Rather, class members sought an interpretation of a federal statute and a determination of whether California qualified for special treatment pursuant to that statute. The only state action affected by the litigation is the State officials' incorrect and misleading assertion that Chapter

154 applies to federal habeas proceedings. Where, as here, any infringement on the State's sovereignty is solely a "necessary consequence of [the officers'] compliance in the future with a substantive federal-question determination," *Edelman v. Jordan*, 415 U.S. at 668, the *Young* doctrine applies. Thus, the nature of the instant proceeding does not constitute a sufficient "affront" to the State to justify departure from the ordinary rule that "[w]hen a plaintiff seeks prospective relief to end an ongoing violation of federal rights, . . . the Eleventh Amendment poses no bar." *Coeur d'Alene*, 117 S. Ct. at 2045 (concurring opinion of Justice O'Connor).[13]

Moreover, as Justice O'Connor recognized in *Coeur d'Alene*, the *Young* exception is especially important when a lawsuit serves a "federal interest in uniformity." *Id.* at 2046. This lawsuit sought a prompt, uniform resolution of the applicability of Chapter 154 in a single proceeding that binds all concerned parties. It sought to avert the

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[13] In *Coeur d'Alene*, Justice Kennedy took an approach to *Ex parte Young* that involves "a careful balancing and accommodation of state interests" and determining "whether there are 'special factors counselling hesitation' " 117 S. Ct. at 2038-39 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)). Under this approach, a court should consider whether a state forum is available for adjudicating the dispute, whether the dispute involves "special sovereignty interests" or an "essential attribute of [State] sovereignty," and the effect of the federal judicial power on the functioning of the State. As demonstrated above, each of these considerations compels the application of *Young* to this case. This lawsuit affects no special sovereign interest, apart from conforming State officials' conduct to federal law, and no state forum is available for resolving this dispute.

chaos and confusion that a multiplicity of suits would cause. Thus, as the Court of Appeals determined, "efficiency and fairness" – interests that are central to the *Young* exception – compel the conclusion that the Eleventh Amendment does not bar relief. *Ashmus*, 123 F.3d at 1205-1206, Pet. App. 13a.

B. THE AVAILABILITY OF FEDERAL HABEAS PROCEEDINGS TO RESOLVE THE APPLICABILITY OF CHAPTER 154 FOR SOME CLASS MEMBERS DOES NOT FORECLOSE THIS LAWSUIT.

The State officials argue that the Eleventh Amendment bars this action because lead plaintiff Troy Ashmus and approximately one-third of the class could have litigated the inapplicability of Chapter 154 in each of their individual federal habeas proceedings. Pet. Brief 16, 32-33. This argument asserts that (1) the exercise of federal judicial power pursuant to *Young* is permitted only when "necessary," and such necessity is never present when a plaintiff has an alternative federal remedy; and (2) the existence of multiple, individual federal habeas proceedings affords the requisite alternative remedy. Both assertions are incorrect.

1. This Court Never Has Held the *Young* Exception Inapplicable Because an Alternative Federal Judicial Remedy Was Available.

This Court has never suggested that a "necessity" requirement dictates the type of lawsuit that must be brought when invocation of federal jurisdiction is otherwise appropriate under the *Young* doctrine. The only

question of "necessity" raised by *Young* is whether the circumstances of the case make it "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst*, 465 U.S. at 105, (quoting *Young*, 209 U.S. at 160). As the State officials explicitly have conceded, the applicability of Chapter 154 to pending federal habeas proceedings is an issue that a federal court must decide. Pet. Brief 26, 27. Indeed, in recognition of "the importance of the underlying issue concerning application of Chapter 154," the State officials "beseeched the District Court" to decide the issue. Pet. Brief 32. The State officials, however, did not want the federal court to "hold [them] responsible to 'the supreme authority of the United States' " in any case other than Mr. Ashmus's. Rather, in pursuit of a presumed constitutional entitlement to "divergent" rulings (Pet. Brief 44), the State officials insist that the federal courts must permit piecemeal litigation of this issue in each of the 145 cases pending in the District Courts of California. The State officials' position is unsupported by any authority and is inconsistent with the notion that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Were this Court to adopt the State officials' "necessity" requirement, suits for declaratory and injunctive relief against State officials would never be permitted because there is always an alternative forum available for resolving the dispute. Such a requirement would eviscerate the *Young* doctrine and would require plaintiffs to

seek vindication of their federal rights only after enduring the hardships condemned by that doctrine. Neither *Young* nor the Declaratory Judgment Act requires the absence of an alternative federal forum to invoke federal judicial review to prevent threatened injury to federal rights. "Prevention of impending injury by unlawful action is a well-recognized function of courts of equity." *Pierce v. Society of the Sisters*, 268 U.S. 510, 536 (1925). "But 'one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is impending, that is enough.' " *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Thus, when contesting the constitutionality of a state criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. at 459. Rather, if there exists a credible threat of prosecution under the statute, the plaintiff is "not required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). In enacting the Declaratory Judgment Act, Congress "recognized that declaratory relief would 'settle controversies,' and permit the federal courts 'the power to exercise in some instances preventive relief."[14]

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[14] A major purpose of the Declaratory Judgment Act is to afford relief from uncertainty and insecurity. *See, e.g.*, Borchard, Declaratory Judgments 929 (2d Ed. 1941) (Act enables party "to avoid the risks of error or disaster by suing an interested adversary for a declaration of his privilege or immunity before acting on his own view of his rights. . . . The removal of the

California v. Grace Brethern Church, 457 U.S. 393, 410 n.21 (1982) (quoting legislative history). Indeed, at the time the Declaratory Judgment Act was enacted, it was clear that "the fact that another remedy would be equally effective affords no ground for declining declaratory relief." Advisory Committee Notes, 1937 Adoption, to Fed. R. Civ. P. 57. This principle is well-exemplified by the decision in *McGrath v. Kristensen*, in which this Court allowed an alien to challenge the actions of the Attorney General in refusing to suspend deportation through a declaratory judgment suit, rather than forcing the alien to "await the traditional remedy of habeas corpus after his arrest for deportation." 340 U.S. 162, 168 (1950).

The State officials rely on this Court's decisions in *Papasan v. Allain*, 478 U.S. 265 (1986), and *Coeur d'Alene*, 117 S. Ct. at 2038, to support their assertion that lawsuits must be "necessary" to vindicate federal rights before the *Young* doctrine is applicable. Pet. Brief. 16, 20-21, 28, 36 n.13. In *Papasan*, this Court used the word "necessary" to describe the *Ex parte Young* doctrine only in the context of reaffirming the principle of *Pennhurst* that the *Ex parte Young* "fiction" was necessary to ensure the supremacy of federal law. 478 U.S. at 277. In *Coeur d'Alene*, the principal opinion of Justice Kennedy, joined by Chief Justice Rehnquist, relied upon the "necessity" language in previous cases, not to inquire whether another federal judicial remedy is available, but rather to consider whether a state forum is available for vindication of the plaintiff's rights, so that the State need never be brought into

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cloud from his claimed privileges and immunities clarifies the rights of all parties concerned."); *see also id.* at 931.

federal court. 117 S. Ct. at 2034 (principal opinion of Justice Kennedy). Justice Kennedy's approach, of course, responded to relevant Eleventh Amendment policies; the State officials' distortion of it does not.

Similarly, the State officials mistakenly rely upon inapplicable case law in asserting that a plaintiff must demonstrate that "access to the courts" is otherwise foreclosed to invoke the *Ex parte Young* doctrine. Pet. Brief 21. The cases cited in Petitioners' Brief did not involve suits against state officers, let alone decisions that involve the application of *Young*; and the "access to the court" language that the officials repeatedly insist is an essential prerequisite of the *Young* doctrine refers, not to the standard for finding a suit barred by the Eleventh Amendment, but rather to this Court's standard for determining whether an administrative mechanism comports with Due Process. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), this Court addressed whether the administrative process created by the Federal Mine Safety and Health Amendments Act of 1977 precluded a challenge to the Secretary of Labor's enforcement of the Act. This Court first concluded that Congress's establishment of a comprehensive administrative mechanism for reviewing violations of the Act precluded a challenge in District Court that bypassed the administrative procedures. *Id.* at 216. This Court then addressed the plaintiff's claim that the inability to obtain pre-enforcement declaratory relief under the administrative mechanism violated the Due Process Clause. *Id.* at 216-218; *see also id.* at 220-221 (concurring opinion of Justice Scalia). In concluding that no

such violation occurred, this Court distinguished *the Due Process violation* found in *Ex parte Young*. *Id.* at 218.[15]

The State officials' reliance on this Court's decision in *Reisman v. Caplin*, 375 U.S. 440 (1964), similarly is misplaced. In *Reisman*, taxpayers sued the Internal Revenue Commissioner for declaratory and injunctive relief from subpoenas issued for tax and accounting records. Although the Court of Appeals in that case held that the suit was barred because the United States had not consented to the suit, this Court ruled that equitable relief was unavailable because the taxpayers had an adequate remedy at law.[16] *Id.* at 441-444. The taxpayers argued that their remedy at law was inadequate because the penalties for noncompliance were so severe as to constitute a denial of judicial review. *Id.* at 446. In rejecting the

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[15] The portion of the decision in *Young* cited by this Court in *Thunder Basin Coal Co.* did not address the question of Eleventh Amendment immunity, but rather addressed the question of whether the Minnesota statute was unconstitutional because it imposed "enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws." *Young*, 209 U.S. at 148. Only after concluding that the federal court had subject matter jurisdiction and that the State law was unconstitutional did this Court determine whether the Eleventh Amendment shielded the State officials from federal judicial power. This Court's holding that a State official is not entitled to sovereign immunity to perform acts "which he had no legal right to do" did not rely upon the absence of an alternative federal forum. *Id.* at 159.

[16] The State officials have never challenged the exercise of equitable jurisdiction in this case on the grounds that the class members failed to demonstrate the elements of a claim for equitable relief or had an adequate remedy at law. No such claim is properly before this Court.

taxpayers' argument, this Court reviewed the discussion in *Young* regarding the appropriateness of equitable relief. *Id.* at 446-448. Nothing in *Reisman* remotely implies that the *Young* exception to the Eleventh Amendment requires an examination of whether an alternative federal forum is available.

Finally, the officials' reliance on *Seminole Tribe* is unavailing. In *Seminole Tribe*, this Court admonished that federal courts "should hesitate" to apply *Young* when "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." 116 S. Ct. at 1132. This Court was concerned that, because *Young* offered a plaintiff "the full remedial powers of a federal court," in contrast with a "more modest" statutory remedial scheme, plaintiffs would be motivated to proceed under *Young*, thus making the remedial scheme Congress had established "superfluous." *Id.* at 1133. The present case simply does not implicate these concerns.

The "remedial scheme" that the State officials point to – the habeas corpus statutes – is not a "less intrusive remedy" that would prevent them from being exposed "to the full remedial powers of a federal court."[17] And the present lawsuit does not "render superfluous" the

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[17] As the Court expressly noted in *Seminole Tribe*, the habeas corpus provisions "stand[ ] in contrast" to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. section 2710(d), the statute at issue therein. 116 S. Ct. at 1133 n. 17 (citing 28 U.S.C. section 2254(e)). The Court noted that the habeas corpus statute is among those "where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*." *Id.*; *see also Brennan v. Stewart*, 834 F.2d 1248, 1252 n.6 (5th Cir. 1988).

procedures provided by the habeas corpus statutes. Far from seeking to circumvent a remedial scheme Congress created, the class members brought this lawsuit to facilitate the implementation of the habeas procedures Congress intended to be applied to death-sentenced prisoners in California.[18]

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[18] The State officials divine an intent by Congress to foreclose suits such as this one because Congress failed to enact pre-AEDPA changes to habeas corpus procedure that, *inter alia*, would have created a private right of action in federal district court for "any aggrieved party" to enforce provisions "for the establishment of a schedule for reasonable hourly rates for the compensation of attorneys." 139 Cong. Rec. S10925, S10930 (text of S.1441, section 8) (1993). Pet. Brief 37. Congress, however, could have failed to enact this legislation for a myriad of reasons, including its understanding that such a remedy was unnecessary in light of the availability of declaratory and injunctive relief to bring state officials into compliance with federal law.

Moreover, Congress's failure to create a right of action to enforce rates of compensation for attorneys says nothing about Congress's desire to foreclose suits to determine whether a State provides competent counsel and reasonable compensation such that it complies with the prerequisites for application of Chapter 154. Indeed, if anything, the absence of any limiting language in the AEDPA demonstrates Congress's intent to permit declaratory actions. Congress enacted the AEDPA with the express intent to limit and foreclose federal judicial review in a number of areas, including habeas proceedings. To effectuate those objectives, Congress explicitly limited federal courts' ability to adjudicate certain disputes. *See, e.g.*, 28 U.S.C. § 2264(a) (limiting in Chapter 154 States district court's review of claims raised and decided on the merits in State court absent specified circumstances); 8 U.S.C. § 1105a (precluding federal courts in actions relating to orders of deportation and exclusion from entering "declaratory, injunctive, or other equitable relief not specifically authorized" by the AEDPA and restricting

2. This Lawsuit is Necessary Because the Alternative Remedy of Federal Habeas is Inadequate.

Even if *Ex parte Young* precluded the class members from seeking equitable relief absent a showing that there are no other proceedings or remedies capable of vindicating their federal rights, the facts of this case would establish the requisite showing. The harm to be remedied by this lawsuit is the uncertainty, and the consequent infringement of class members' entitlement to the benefit of Chapter 153 habeas procedures, that result from the State officials' persistent, erroneous assertions that California qualifies for Chapter 154 status. Until the class members obtained a definitive, binding determination whether California did or did not meet the prerequisites of Chapter 154, they were forced to prepare and litigate their habeas claims under a cloud of uncertainty. Among the most portentous aspects of this uncertainty was the possibility that Chapter 154 might be held to impose a retroactively-applicable 180-day statute of limitations for the filing of habeas corpus claims.

The force of the State officials' own arguments demonstrates that class members could not dispel the uncertainty and obtain a reliable determination of their rights merely by litigating this issue in the context of their individual habeas corpus actions. The officials catalog the substantive and procedural obstacles that prevent the class members from securing a uniform ruling in their

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judicial review to habeas proceedings). The AEDPA contains no similar limitations on a federal court's authority to entertain and resolve a declaratory judgment action regarding the applicability of Chapter 154 to habeas proceedings.

separate cases that would "carry preclusive effect in other habeas cases." Pet. Brief 39. Even if the class members had secured "a truly 'binding' ruling" in habeas proceedings, the officials point out, the "ruling would, at most, dictate conforming *rulings* at the district court level; it would not preclude the state from *asserting* its opposing view, if only to preserve the issue for further review." Pet. Brief 40 (emphasis in original). As envisioned by the State officials, a multiplicity of potentially "divergent" rulings on the question would serve only to compound the uncertainty and postpone definitive resolution of the issue pending "further review" by appellate courts. Thus, the limited remedies available in the context of individual habeas cases would not provide the class members with any measure of finality, predictability, or certainty regarding the procedures that govern the litigation of their claims for relief from judgments of death.

This lawsuit was also necessary to vindicate the federal rights of death-sentenced inmates whose cases were pending on direct appeal or in state habeas proceedings. These class members had no recourse other than the present suit to obtain a timely clarification whether, at the risk of their lives, they could rely on the timetables set by Chapter 153 or were required, as the State officials threatened, to conform to the much faster timetables of Chapter 154. Contrary to the officials' assertion, Pet. Brief 34 n.11, these state prisoners, who had not been provided with the representation and litigation resources that Congress required as a precondition for the State to obtain Chapter 154 benefits, had every "occasion" and "entitlement" to seek relief from the State officials' threats that they might be committing suicide by complying with the procedures

that they thought (and the courts below held) Congress intended to govern their cases. The District Court made undisputed factual findings that, at the time of its ruling, the State officials had failed to provide any attorney to over 130 death-sentenced prisoners, some of whom had been waiting up to four years for the appointment of counsel. *Ashmus*, 935 F. Supp. at 1055, Pet. App. 27a-28a. But for their inclusion in this lawsuit, these unrepresented prisoners could never have ascertained until after the fact whether their cases were governed by the "fast-track" procedures of Chapter 154. Only this lawsuit provided an adequate forum to vindicate these prisoners' rights by forcing the State officials to obey federal law – either by establishing the requisite mechanism for appointment and compensation of counsel in state proceedings as contemplated by Congress, or by foregoing the benefits of Chapter 154 procedures to which they were not statutorily entitled.

A uniform, binding ruling preventing State officials from claiming, in contravention of federal law, that California was entitled to preferential treatment pursuant to Chapter 154 was the only effective remedy in this situation, as the courts below concluded. Indeed, the essence of the State officials' resulting complaint is that the order granting declaratory and injunctive relief has had its desired and "necessary" effect: State officials have been prevented from using endless, bad faith relitigation of a settled issue as a means to create and exploit chaos in federal habeas corpus litigation. Nothing in *Ex parte Young* or its progeny suggests that the class members are constitutionally required to settle for a less effective remedy.

II.

THE DISTRICT COURT PROPERLY INVOKED ITS INHERENT POWER TO ENJOIN STATE OFFICIALS FROM RELITIGATING THE APPLICABILITY OF CHAPTER 154 IN OTHER COURTS.

Despite their abundant use of ample opportunities to present their arguments that California is entitled to the benefits of Chapter 154 in voluminous briefing before the District Court, the Court of Appeals, and in their Petition for Certiorari to this Court, the State officials assert that the District Court's order enjoining them from relitigating that question in individual habeas proceedings is a "content-based, viewpoint-specific restriction on protected expression" and an "impermissible prior restraint of First Amendment freedoms." Pet. Brief 45. They do not contend that the process for resolving the central question in this dispute was flawed or that either the District Court or the Ninth Circuit unfairly restricted their ability to present their arguments in this litigation. Rather, it is because these courts reached a conclusion inconsistent with the State officials' view of Chapter 154 that their constitutional objections arise. Simply put, having lost, the State officials believe that the Constitution guarantees them the right to relitigate the same question in the hope of obtaining a different result in another court.

It does not. The constitutional guarantee of the freedom of speech does not encompass a right to relitigate properly-resolved legal questions and forum shop in the hope of creating divergent judicial decisions. If the State officials' view of the First Amendment were right, courts would be powerless to promulgate and enforce rules

prohibiting the filing of endless motions for reconsideration or limitations on successive habeas petitions because such rules foreclose "legal advocacy in the very fora where legal advocacy is expected to flourish." Pet. Brief 18.

Federal courts are authorized to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see also* 28 U.S.C. § 2202. In *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977), this Court explained that federal courts may "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." One such command is the issuance of injunctive relief to enforce an "explicit, ongoing order against relitigation of matters [the court] had already decided." *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1431 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *see also In re VMS Securities Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996); *White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995); *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO*, 907 F.2d 277, 279 (2d Cir. 1990). Injunctive relief barring relitigation of already-decided matters protects against a significant risk of inconsistent rulings, *International Brotherhood*, 907 F.2d at 280-281; avoids repetitive and burdensome litigation; and promotes judicial economy by consolidating all litigation relating to a particular issue in one

forum, *see National Assoc. for the Advancement of Colored People, Minneapolis Branch v. Metropolitan Council*, 125 F.3d 1171, 1174 (8th Cir. 1997); *White*, 41 F.3d at 409.

Here, in a class action, the District Court rejected the State officials' arguments and issued a declaratory judgment that Chapter 154 did not apply to California capital cases. Indeed, the court found that an injunction was necessary precisely because the State officials threatened and sought to relitigate Chapter 154's applicability in each of the 145 individual habeas cases pending in the California federal courts. *See Ashmus*, 935 F. Supp. at 1057, Pet. App. 32a. Such repetitive litigation of the identical issue would not only place a great burden on the federal judiciary's limited resources; it would create a significant risk of inconsistent rulings about Chapter 154's applicability. The effect of such inconsistent rulings would be to resurrect the very uncertainty the declaratory judgment was intended to eliminate.

An injunction against relitigation in these circumstances does not violate the First Amendment. "Not all injunctions which may incidentally affect expression . . . are 'prior restraints'." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 n.2 (1994). The injunction simply channeled litigation relating to a complex matter into the federal court that first assumed jurisdiction over the controversy. The State officials remain free to voice their opinion in this litigation and elsewhere; they are prohibited only from expressing it in other *litigation* involving class members. The injunction was not issued because of the content of the State officials' expression, but because their *conduct* in attempting to relitigate Chapter 154's applicability before other courts threatened to

frustrate the District Court's declaratory judgment. *See id.* at 764, n.2.

As the Eighth Circuit has noted, "[r]ules of procedure frequently force litigants into courts not of their choosing, but due process and the First Amendment require only that an impartial forum be available to litigants, and not that the doors of every courtroom in the land be open to them." *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987). Certainly, if a federal court has the power to prevent frustration of its orders by removing potentially inconsistent state law claims to federal court, *NAACP*, 125 F.3d at 1173-1174, or by enjoining the parties before it from pursuing conflicting litigation in other *fora*, *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997); *White*, 41 F.3d at 409, it can enjoin a party from relitigating in other *fora* issues the court already has decided without affronting First Amendment principles.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-391

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A. The State's Immunity from Suit

1. Ashmus variously refers to state officials' asserted views on the application of Chapter 154 as "misleading," "erroneous," "unfounded," "wrongful," "incorrect," and a "misinterpret[ation]." See, *e.g.*, Resp. Br. 18, 19, 23, 25, 35. These characterizations—even assuming they were accurate—demonstrate no basis for defeating the Eleventh Amendment.

The *Ex parte Young* doctrine operates to "strip" a state official of Eleventh Amendment immunity "only where the underlying authorization upon which the named official acts is asserted to be *illegal*." *Papasan v. Allain*,

478 U.S. 265, 277 (1986) (emphasis added); *Ex parte Young*, 209 U.S. 123, 159 (1908) ("[T]he officer is simply prohibited from doing an act which he had no legal right to do"). By no stretch of the imagination can state officials' "assertions" of their understanding of the state of the law constitute an "illegal" act. Quite to the contrary, such assertions—no less than any inmate's competing assertions—are integral to the adversarial process. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-300 (1937) (state officers who "seek . . . a judicial determination" on the state's behalf perform an official duty, the restraint of which is prohibited by the Eleventh Amendment). Defending presumptively valid criminal judgments from collateral attack with good faith legal arguments is scarcely something state officials "have no legal right to do." See Br. for Pet. 5.[1] And state officials' entitlement to be free of preemptive judicial intervention in that regard does not depend on the extent to which a court thinks their position to be correct, for "at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 113 (1984) (citing *Larson v.*

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1. Inmates properly enjoy a similar measure of latitude when challenging their state judgments. Thus, although Ashmus was plainly mistaken, for example, when arguing that California's review mechanism is not "unitary" in structure, see Pet. App. 65a, when contending that Chapter 154 conditions state compliance on the existence of competency standards that "require previous experience in habeas corpus litigation," see *id.*, at 19a, and when insisting that he had evaded application of the AEDPA's amendments to Chapter 153 simply by making his request for appointment of federal counsel before April 24, 1996, compare *id.*, at 26a-27a, 42a, with *Ashmus v. Calderon*, 977 F. Supp. 987, 988, and n. 3 (ND Cal. 1997), he did not thereby act "illegally." He simply erred in his interpretation of federal law.

Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949) ("we . . . reject[] the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so") (suit against federal officer). "Any resulting disadvantage to the plaintiff [is] 'outweigh[ed]' by 'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention'"—a need that is, "[i]f anything, . . . *even greater when questions of federalism are involved*." *Pennhurst*, at 113-114 (emphasis added); see also *id.*, at 110-112, and nn. 20, 22.

2. Ashmus's next tack is to blame state officials' assertions for "creat[ing] substantial uncertainty and concern about what procedures would govern" federal proceedings, which uncertainty in turn allegedly "created an untenable dilemma" for death-sentenced prisoners: Supposedly forced to "gamble" that Chapter 154 either would or would not apply, prisoners would either file or not file within the provision's 180-day limitations period. *Id.*, at 3, 16, 35. Ashmus invokes what he calls the District Court's "undisputed factual findings" that state officials' assertions had "coerced" and "intimidate[d] class members into complying with Chapter 154." *Id.*, at 9, 10, 13, 18-19, 22. This description of events is erroneous, and the theory it hatches for stripping state officials of their Eleventh Amendment protections is doctrinally incoherent.

First of all, it is manifest that any sense of "uncertainty" experienced by inmates could only reasonably stem from *Congress's enactment* of Chapter 154, for a state's capacity to qualify under its provisions hinges not on what state officials might say about the subject to the United States Senate or inquiring journalists, see Record Doc. Nos. 6-7 and Exhs. 2-3, but on the single contingency prescribed by Congress: "if the State meets certain conditions" in the structuring of its capital review procedures. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997). See

Death Row Prisoners of Pennsylvania v. Ridge, 948 F. Supp. 1258, 1265-1266, 1274 (ED Pa. 1996) (identical suit brought against state officials who declined to assert *one way or the other* whether they believed Chapter 154 applied). Presumably, state officials' views on the question of state compliance—like those advanced by any prisoner—would be carefully considered by federal courts; however, neither side's assertions will be determinative of anything until they receive judicial endorsement. See Pet. App. 33a ("Congress . . . has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies").[2/]

Moreover, notwithstanding Ashmus's claims and the District Court's purported "findings," the record contains *no "factual" showing whatsoever* that any death row inmate in California ever took any action, or failed to take any action, on account of anything state officials said about the applicability of Chapter 154. As for Ashmus's insistence that his mischaracterization has gone "undisputed" by state

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2. As Ashmus once acknowledged, "The problem confronting plaintiffs was this: At the time we filed this lawsuit, the day that this legislation was signed, *the time was running as soon as President Clinton signed the bill.*" SER 9 (emphasis added); compare Resp. Br. 20, n. 7. And he further acknowledged that no inmate's interest in "certainty" would have been furthered if the state had *withheld* its views in favor of "waiting until people missed the six-month statute of limitations and then saying, 'Aha, we've got you.'" SER 103. In short, state officials' silence could confer neither the "prompt *judicial* determination" nor the "definitive *judicial* answer" Ashmus demands. Resp. Br. 5, 16 (emphases added). And whether Chapter 154 is "self-executing," whether a state bears any "burden" of demonstrating compliance, and whether there are circumstances under which the Chapter's provisions might be "waived," are beside the point. *Any* party to litigation has the capacity to make it less contentious in any number of respects, or even to moot it entirely—*e.g.*, by dismissing suit, admitting liability, pleading guilty, or conceding some lesser point; but none of this converts adversaries into "lawbreakers," for *judicial* process exists to resolve any *disputed* matters that remain.

officials, we can only observe that this brief will mark the *fourth* time we have corrected his error. See Pet. Reply to Br. in Opp. to Cert. 2, n. 1; State's Supp. Br. on Appeal 8; State's Reply Br. on Appeal 4-5; see also State's Opening Br. on Appeal 29, n. 6. At any rate, for all his references to the "extensive, and unchallenged, factual finding" that supposedly went on below, Resp. Br. 6, 9, 17, 22, he does not dispute that, as the Ninth Circuit correctly discerned, "the basis for the injunction" against state officials' advocacy is simply "the district court's determination that California does not comply with Chapter 154," Pet. App. 8a-9a, not any purported "factual findings about the nature and effect" or "consequences" of state officials' conduct. And whether California qualifies under Chapter 154 is, as even Ashmus appears to acknowledge, a "legal question," not a factual one. Resp. Br. 12, 16.

Accordingly, the Ninth Circuit's own discussion of the "continuing or impending violation of federal law" supposedly committed by state officials likewise relies on no "factual findings," but proceeds almost entirely from that court's misunderstanding of how federal counsel are appointed and how Chapter 154 might affect inmates' ability to amend their petitions or secure stays of execution. Pet. App. 10a-12a. Ashmus, understandably, makes no effort to defend the Ninth Circuit's thoroughly mistaken analysis of those matters. See Br. for Pet. 28-31. Instead, describing his "hardship" of "uncertainty" in far less convoluted terms, he claims he was confronted with only two choices: (1) initiating this lawsuit or (2) "gambling" on the law's application by filing a petition at a time that might ultimately prove to be either (a) late or (b) as much as six months more "timely" than legally required. Resp. Br. 3, 16, 29. But at this stage of Ashmus's briefing, he assiduously overlooks his third option, the existence of which he has repeatedly conceded and the effectiveness of which he knows from personal experience: He simply could ask his habeas judge to rule upon the applicability

of any provision of the AEDPA about which he feels unsure. See *Ashmus v. Calderon*, 977 F. Supp., at 988, n. 3; Resp. Opp. to Pet. for Cert. 7, 16, n. 10. Ashmus eventually goes on to acknowledge that other option, at which point he is forced to dispute its significance to application of *Ex parte Young*'s exception.

3. In Ashmus's view, see Resp. Br. 14-34, a private party's ability to strip state officials of their Eleventh Amendment immunity under *Young* does not depend on whether resort to that doctrine is *necessary* to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States; rather, he argues, it is sufficient that the suit against state officials "serves" that objective by "challeng[ing] . . . their interpretation of the federal law," and thereby presenting an occasion "to declare the meaning of federal law with which they must comply." *Id.*, at 18, 21-22. With that understanding, Ashmus concedes that the precise legal question on which he and state officials disagree—whether the capital review mechanism in place in California since June of 1989 is a qualifying mechanism within the contemplation of Chapter 154—is one that federal courts can and will resolve, as appropriate, in the regular course of adjudicating any habeas proceedings in which it actually arises. Ashmus simply insists that the availability of this "alternative federal forum," *id.*, at 31-33, and n. 15, for enforcing federal law is inconsequential to *Young*'s application. Ashmus is again mistaken.

"'*Ex parte Young* was the culmination of efforts by this Court to *harmonize* the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.'" *Pennhurst*, 465 U.S., at 105 (quoting *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)) (emphasis added). The scope of the doctrine is

thus defined by its salutary purpose: to "ensure[] that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The circumstances justifying invocation of the *Ex parte Young* doctrine are clear: *"when absolutely necessary"* to vindicate federal law. *Fenner v. Boykin*, 271 U.S. 240, 243 (1926), *quoted in Younger v. Harris*, 401 U.S. 37, 45 (1971).

Thus, where regular legal process—be it habeas corpus process or any other variety of federal adjudication to which the state is a party—will necessarily provide resolution of any question of federal law actually implicated in that dispute, "vindication" of federal law will occur as a matter of course, "erroneous" advocacy by state officials can have no "injurious" consequences, and the rationale for allowing a separate suit under *Young*'s exception simply does not obtain. In such a situation, there is manifestly no risk that the Supremacy Clause will be deprived of its "life," *Green v. Mansour*, 474 U.S. 64, 68 (1985), or that state officers will "employ the Eleventh Amendment as a means of avoiding compliance with federal law," *Puerto Rico Aqueduct*, 506 U.S., at 146.

The flaw of the Minnesota law at issue in *Young*—and the reason this Court authorized suit against the State Attorney General—was that it operated "in effect, to close up all approaches to the courts, and thus prevent any hearing upon" its validity. *Young*, 209 U.S., at 148. That is the holding of *Young*, and it supplies the precise basis on which that decision has been subsequently distinguished in what otherwise would have been analogous contexts. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-218 (1994); *Reisman v. Caplan*, 375 U.S. 440, 446-450 (1964).[3]

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3. Ashmus misreads *Young* when he asserts "Only after conclud-

To be sure, in those limited circumstances where *Ex parte Young* actually lies, the suit will doubtless perform a valuable interpretive function. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2036 (1997) (principal opinion of Kennedy, J.), *cited in* Resp. Br. 21. But a party's "request that the federal court interpret a federal statute," Resp. Br. 24, has never been deemed sufficient basis for suit under the *Young* exception. *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 186 (1964) ("Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States'"). Indeed, in the absence of a bona fide cause of action, a request to construe federal law will not even establish federal subject matter jurisdiction. See *California v. Sierra Club*, 451 U.S. 287, 298 (1981) (refusing to construe Rivers and Harbors Appropriation Act of 1899).[4]

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ing that the federal court had subject matter jurisdiction and that the State law was unconstitutional did this Court determine whether the Eleventh Amendment shielded the State officials from federal judicial power." Resp. Br. 32, n. 15. This Court in *Young* did not determine that Minnesota's railroad rates were unconstitutionally confiscatory; rather, it struck down the law "without regard to the question of the insufficiency of those rates." 209 U.S., at 148. Indeed, upon further exploration and review of the question (the opportunity for which wisely was not foreclosed by an injunction against further advocacy), it was determined that the rates prescribed by the state were substantially *valid*. See *Minnesota Rate Cases*, 230 U.S. 352, 380, 465-472 (1913).

4. In these proceedings, we need not question, and thus have expressly declined to question, whether the Declaratory Judgment Act creates a free-standing "cause of action," inasmuch as the instant suit against state officials is barred in all events by the Eleventh Amendment. Br. for Pet. 22; compare Resp. Br. 7, n. 3. For similar reasons, we also decline Ashmus's invitation to debate whether the *Young* doctrine—in those situations where it *does* apply—"create[s] a separate and independent cause of action," an issue on which Ashmus and some commentators would apparently disagree. Compare Resp. Br. 21, n. 8, with P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1181 (3d ed. 1988). Neither matter will resolve what is in dispute here: whether state officials "violate" federal law by expressing their understanding of it, and whether, notwithstanding the Eleventh Amendment, a separate suit against state officials is necessary to "correct" the "harm" that assertedly results from state officials' understanding of Chapter 154 in particular. See Resp. Br. 22 (where Ashmus focuses on "the consequences of the State officials' conduct" in his effort to demonstrate *Young*'s applicability) with *id.*, at 23, n. 11 (where Ashmus oddly suggests that state officials' "actions" and the "harm" assertedly caused "by those actions" are matters affecting "justiciability" but *not* application of *Young*); see also *id.*, at 21 n. 8 (where Ashmus suggests, even more oddly, that distinguishing the enforcement or adjudicatory role of federal courts from the adversarial role of state officials implicates "justiciability questions" (such as ripeness), but not "*Young* analysis"); *id.*, at 23, n. 11 (same).

That Chapter 154's application can be decided in the ordinary course of habeas litigation is significant not so much because habeas procedures provide an "adequate legal *remedy*" for redressing any "violation" of federal law; rather, it is because those procedures provide the occasion for a federal court to correctly apply federal law *in the first instance*. Compare Resp. Br. 32 n. 16 with State's Opening Br. on Appeal 48.[5]

Ashmus argues that *Young*'s narrow exception must extend beyond its "necessary" application; otherwise, he claims, "suits for declaratory and injunctive relief against

5. Because giving effect to the Eleventh Amendment in this case will not "shield" state officials' understanding of federal law from federal review, Resp. Br. 21, it cannot undermine the "acknowledged . . . importance of having federal courts open to enforce and interpret federal rights." *Coeur d'Alene Tribe*, 117 S. Ct., at 2045-2046 (concurring opinion of O'Connor, J., joined by Scalia and Thomas, JJ.). Those habeas courts that will be called upon to construe and apply Chapter 154 are no less "federal" than the court in which Ashmus filed the instant suit. Compare Resp. Br. 28 (mistakenly accusing state officials of not wanting to be held responsible to federal law "in any case other than Mr. Ashmus's").

State officials would never be permitted because there is always an alternative forum available for resolving the dispute." Resp. Br. 28. Not surprisingly, Ashmus does not identify the federal forum he believes will "always" be available; nor, of course, does he identify the particular federal forum that supposedly was available to the railroad's shareholders in *Young*. See 209 U.S., at 146, 147 (describing how Minnesota law operated "to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity" as effectively as if the law had expressly "prohibited the company from seeking judicial construction of laws which deeply affect its rights"). Unlike the imminent harm of illegal arrest, prosecution, or deportation (the "consummation" of which executive officials are in a position to effect, but which no victim is required to "await," Resp. Br. 29-30), a habeas court's impending construction of Chapter 154 is not a "hardship" from which parties can demand "preventive relief."

Ashmus believes that the only proposition relating to "necessity" that a would-be *Young* plaintiff must demonstrate is a truism: the "need" to keep federal law "supreme." Resp. Br. 27-28. The implications of this theory are striking: For every point of federal law on which a state and any private party might disagree, the basis for an entirely new lawsuit would appear. See Brief for State of Maryland et al. as *Amicus Curiae* 13-14. This Court has never endorsed such an extravagant reading of *Ex parte Young*. See *Parden*, 377 U.S., at 186; *Papasan*, 478 U.S., at 277 (observing that *Young* has been "tailored . . . precisely"). It should not do so now, for allowing suits to be brought against state officials whenever an unanswered question of federal law looms—and without regard to whether stripping them of the protections afforded by the Eleventh Amendment is "*absolutely necessary*" to vindicate the federal judiciary's interpretive function—would no longer "*harmonize*" competing constitutional commands in

the manner *Young* designed. One casts no doubt on the "need" to keep federal law supreme by recognizing the extreme infrequency with which private parties "need" to resort to *Young* for that purpose.

4. Ashmus next argues that his suit *is* necessary as required by *Young*. He makes two points: He first argues that precluding all but one district court from considering Chapter 154's application is essential to overcoming those "substantive and procedural obstacles" that lay in his path to securing a ruling that provides him with the measure of "definite[ness]," "predictability," "uniform[ity]," "certainty," and "finality" he desires. Resp. Br. 35-37. He does not dispute that any habeas petitioner who wants a ruling on Chapter 154's applicability can obtain (and ordinarily rely upon) one from the court before which that prisoner's habeas proceeding is pending; however, he perceives—correctly—a "significant risk" that other courts will disagree with the conclusion reached in this case if given the opportunity to hear the state's views. *Id.*, at 35-36, 40. He therefore insists a single suit that secures a single legal ruling on this "question of grave importance," made reviewable only once, and never thereafter subject to further consideration by *any* court, at *any* level, is the "only effective remedy" for his purposes. *Id.*, at 15, 36-37. Second, he claims that death row inmates who have yet to exhaust state remedies, unlike those who have moved on to federal court, have "no recourse other than the present suit to obtain a timely clarification" of Chapter 154's application. *Id.*, at 36. These points are unavailing.

Ashmus's first contention about the perceived inadequacy of rulings attainable in individual habeas proceedings is sharply inconsistent with his view that habeas's procedural regime is not too "modest" or "limited" for his purposes. Compare Resp. Br. 33-34 (asserting that habeas "is not a 'less intrusive remedy'") with *id.*, at 36 (discussing "the limited remedies available in the context

of individual habeas cases"). In that regard, Ashmus earlier seemed to suggest that because habeas has itself sometimes been characterized as "*Ex parte Young*-like,"[6] it provided him with a pre-existing basis for subjecting state officials "to the full remedial powers of a federal court." *Id.*, at 33, and n. 17. Presumably, Ashmus believes this responds to our contention that the *Young* doctrine cannot be used to circumvent habeas's carefully crafted limitations. *Id.*, 33-34; see Br. for Pet. 38-41. Ashmus, however, cites no authority declaring that a habeas court's "remedial power" extends to dictating which legal arguments state officers will be allowed to make when defending the state's interests in "any state and federal proceeding" where their arguments could matter. No such authority exists, of course, for a more "far-reaching and invasive form of relief," Resp. Br. 25, would be difficult to imagine. Cf. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (federal "commands" to state officers "are fundamentally incompatible with our constitutional system of dual sovereignty").[7]

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6. "[T]he habeas theory of a civil suit against the bad jailer fits perfectly with the *Ex parte Young* fiction." *Brennan v. Stewart*, 834 F.2d 1248, 1252, n. 6 (CA5 1988), *quoted in Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1182, n. 62 (1996) (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.); see also *id.*, at 1133, n. 17 (opinion of Rehnquist, C.J., for the Court).

7. More generally, Ashmus apparently believes that if a state officer can "be brought into federal court" for *one* purpose, Resp. Br. 30-31; see also *id.*, at 14 ("Once federal jurisdiction is properly invoked . . . under the various requirements for declaratory and injunctive relief"), the protections afforded by the Eleventh Amendment are defeated for *all* purposes, leaving the officer thereafter vulnerable to any type of suit for any form of relief. *Id.*, at 14, 21, n. 8, 27, 30-31. This view—like Ashmus's suggestion that Congress, by failing to expressly "foreclose" the instant suit, demonstrated its "intent to permit" *increased* prisoner litigation under the AEDPA, *id.*, at 34, n. 18—finds no support in law, history, or reason.

Thus, Ashmus is quite correct when he later observes that the habeas regime would have presented him with a number of "substantive and procedural obstacles" to obtaining a ruling as terminally "binding" as the one he secured in this case. But this observation defeats his resort to *Young* rather than advances it, for circumventing attendant legal processes (and thereby foiling the protections and recourse they afford one's opponents in litigation) is not a permissible objective of suits brought under *Ex parte Young*. See *Seminole Tribe*, 116 U.S., at 1132-1133 (majority opinion) (circumvention prevented by barring "alternative" *Young* suit); *id.*, at 1183 (dissenting opinion) (proposing that circumvention be avoided by allowing suit under *Young*, but keeping it subject to all applicable procedural limitations).

As for Ashmus's second point, we understand him to argue that although prisoners who have yet to exhaust their state remedies are prohibited from invoking the power of the federal courts to challenge the lawfulness of their confinement, they nonetheless should be entitled under *Ex parte Young* to contest which federal procedures would govern the very federal challenge they are not allowed to bring. We think this argument is defeated by the force of its own expression.

5. Ashmus wonders "precisely how California's sovereign interests are more appreciably affected by this litigation" than would have been the case if he and other inmates had simply adhered to the habeas regime. Resp. Br. 24. He would not raise such a question if he understood that "the Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued," and that every time a state is subjected "to the coercive process of judicial tribunals at the instance of private parties" it is denied "the respect owed [it] as [a] member[] of the federation." *Puerto Rico Aqueduct*, 506 U.S., at 146, and n. 5. That indignity is only

compounded where, as here, the unauthorized suit is used to defeat the very "substantive and procedural" provisions of law which, though appearing as "obstacles" to Ashmus, had afforded California the precise measure of protection to which Congress, being mindful of comity and federalism in ways one could not expect of death row inmates, determined all states are entitled. And the most egregious affront in this case, of course, is that, for nearly two years, California's officers have been restrained, under pain of contempt, from advocating the state's position on an important question of law in any proceeding except the contrivance that is this lawsuit.

None of the foregoing indignity can be justified by reference to a purported concern for "'reduc[ing] the cost and delay of civil litigation.'" Pet. App. 13a; see also Resp. Br. 27. In the first place, "Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity." *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). Moreover, even if "judicial economy" were a relevant consideration, no one genuinely interested in "expedit[ing]" the course of litigation—a claim which, when made by a death row habeas petitioner, Resp. Br. 3, 34, must be viewed with healthy skepticism[8]—would propose supplanting the "swift, flexible, and summary" design of the habeas corpus regime with the cumbersome machinery of complex civil litigation strategies. See *Preiser v. Rodriguez*, 411 U.S. 475, 495-496 (1973). The latter achieves no economy over the former, as a comparison of Ashmus's own experiences plainly illustrates: When he grew uncertain about the proper application of amended Chapter 153, Ashmus proceeded

8. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 2 (Aug. 23, 1989) (observing that death row inmates, at least historically, have had "no incentive to move the collateral review process forward until an execution date is set").

by motion in his habeas proceeding, to which the court responded in just six days, and without any hearing, by issuing a 9-page order devoted entirely to the substance of Ashmus's concerns. 977 F. Supp., at 987-995. By contrast, the "§1983/*Ex parte Young*" lawsuit Ashmus fashioned to secure a "speedy" and "convenient" construction of Chapter 154 consumed a three-month period of proceedings in the District Court, requiring multiple appearances, and culminating in a 29-page order, only 7 pages of which actually address the merits of whether California qualifies under the new measure. Compare 935 F. Supp., at 1048-1076 with *id.*, at 1069-1075.[9]

6. Finally, Ashmus's briefing contains a miscellany of misstatements and distortions. Although none seems likely to prejudice the outcome of these proceedings, four are sufficiently misleading as to merit prompt correction.

a. Ashmus asserts that we "did not invoke the [Eleventh Amendment] defense during the declaratory judgment and preliminary injunction proceedings," and he implies this might explain why "[t]the District Court did not address the Eleventh Amendment in its order." Resp. Br. 7 n. 2. The suggestion is specious (not to mention pointless, *Pennhurst*, 465 U.S., at 99, n. 8), for (as Ashmus notes) we asserted the defense *twice* in our pleadings,

9. Ashmus certainly achieved no economy when he effectively forced the state to litigate Chapter 154's applicability against *every* inmate potentially affected by it, including those as to whom we might have elected, in the exercise of our discretion, not to press the point; such cases might be those in which we discern that Chapter 154 would not significantly affect the outcome or, for other reasons, we think it prudent to allocate the public's resources to demonstrating different bases for rebuffing inmates' collateral attacks (*e.g.*, their lack of merit, failure of exhaustion, or procedural default). Cf. 28 U.S.C. §2254(b)(2). Ashmus might not like it that the state would "pick and choose" to litigate in this way, SER 103, but the prerogative to do so is one of the fundamental interests and functions of any sovereign. Cf. *United States v. Mendoza*, 464 U.S. 154, 159-161 (1984).

and—as Ashmus fails to note—the District Court's own questions for counsel during the proceedings evinced an *explicit* understanding of our "claim that the 11th Amendment bars this suit." Record, Doc. No. 44, p. 1, ¶A.1; see also SER 52-53. The court's failure to address that defense must find its explanation elsewhere.

b. Ashmus mistakenly believes that "State officials advocated three different interpretations of how Chapter 154 applied to capital habeas petitioners." Resp. Br. 4, n. 1. But we never urged that any inmate's petition be deemed already "barred" as of April 24, 1996, and we told William Kirkpatrick in particular of our view that he "would have 180 days from April 24, 1996, . . . or October 21, 1996, within which to file his petition." Record, Doc. No. 15, Exh. 6 (filed Apr. 24, 1996), pp. 15, 18, cited in Resp. Br. 4, n. 1. In our very first pleading filed in this case, we told Ashmus the same thing: "no later than six months from April 24, 1996 (i.e., by October 21, 1996)." *Id.*, Doc. No. 11 (filed Apr. 29, 1996), p. 3, cited in Resp. Br. 4, n. 1. The 180-day limit applied to both Kirkpatrick and Ashmus because the convictions of each had been affirmed on or after June 6, 1989, such being the date on which the state's qualifying mechanism became effective. See also Pet. App. 30a-31a. By contrast, because the judgment of inmate Richard Odle pre-dated June 6, 1989, the state immediately disavowed any intention to seek application of Chapter 154 in his case. See Record, Doc. No. 15, Exh. 7 (filed Apr. 29, 1996), p. 5, n. 3, cited in Resp. Br. 4, n. 1. The state having never urged a different result in any case involving a pre-June 1989 judgment, and the judgments of both Ashmus and Kirkpatrick in particular having been affirmed *after* June 6, 1989, the pleading we filed in Odle's case did not, and logically could not, "later amend" anything we had said earlier to Kirkpatrick or that same day to Ashmus. And although the significance of the June 6, 1989, cut-off was evident to Ashmus from the outset, see *id.*, Doc. No. 6, p. 13 (Apr. 24, 1996);

id., Doc. No. 18 (May 1, 1996), pp. 7-8, we served him with repeated, consistent "reminders" about it, starting from our very first appearance in the District Court. SER 18-19 (May 2, 1996); see also Record, Doc. No. 40 (May 17, 1996), p. 7, n. 5.

c. Ashmus claims that we "essentially admit that [our] objective is to procure the benefits of Chapter 154 without regard to its eligibility requirements when [we] argue that petitioners can eliminate any uncertainty over Chapter 154 by complying with the chapter's timetables until the question is finally resolved." Resp. Br. 22, n. 10. What we actually said, of course, is that inmates can resolve their uncertainty by simple motion, Br. for Pet. 16, 27, 32-34, 38, and can do so *before* filing any petition they think to be "premature," but we had also assured Ashmus that if he nevertheless elected to file a petition within the 180-day period "out of abundance of caution" we would not later oppose any timely effort to modify its contents if that course were to prove necessary. *Id.*, at 30, n. 7.

d. Ashmus contends that our continuing demand for the immediate restoration of our adversarial rights "is inconsistent with [our] approach in the Ninth Circuit," where, he reports, we "had urged the court to resolve the dispute in a manner that eliminated the possibility of obtaining 'divergent opinions' about the applicability of Chapter 154." Resp. Br. 24, n. 12. In truth, we told the Ninth Circuit that the District Court's unconstitutional injunction "must . . . be vacated and the cause remanded with instructions to dismiss," State's Supp. Br. on Appeal 13, thereby allowing us to pursue the concededly "significant" prospect, Resp. Br. 40, that other district courts would accept our view respecting Chapter 154's application to California judgments—an opportunity that had been previously foreclosed to us when Ashmus hijacked all litigation on the issue from the several courts in which it otherwise would have been resolved long ago. Also concerned with the delay Ashmus's tactics had caused, we

offered to stipulate to early issuance of the mandate to facilitate immediate reconsideration of the merits by the District Court *in Ashmus's habeas proceeding*, and, if necessary, by the Ninth Circuit in an expedited appeal—a course that, however imperfect and whatever its outcome, at least would have ended the District Court's ongoing violation of our rights secured by the First and Eleventh Amendments. State's Supp. Br. on Appeal 13-15.

B. The State's Freedom to Advocate

In response to our First Amendment claim, Ashmus largely reprises the argument, first advanced in his opposition to our petition for certiorari, that the injunction against state officials' advocacy is authorized by the All Writs Act. Resp. Br. 39-40. This argument merits no extended response because, as we explained in our reply to Ashmus's opposition, the All Writs Act played no part whatsoever in the decisions of the district or circuit courts, and it could provide, at any rate, no more valid a basis than does *Ex parte Young* for circumventing prescribed procedures that inmates happen to find "inconvenient" or "less appropriate." Pet. Reply to Br. in Opp. to Cert. 8-9 (citing *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985)).

Ashmus insists the injunction "was not issued because of the content of the State officials' expression," and suggests that its effect on the state's ability to express the view it actually holds about Chapter 154 is simply "incidental[]" to the injunction's aim: preventing state officials from "forum shop[ping]" and engaging in "repetitive," "duplicative," "piecemeal," "bad faith relitigation" in "every courtroom in the land." Resp. Br. 38-41; *id.*, at 14, 24, n. 12, 27, 37. Ashmus, however, would do well to recall that until he filed this suit, the only party facing any prospect of "a multiplicity of suits," *id.*, at 27, was the state; and obviously no portion of that "great burden on the federal

judiciary's limited resources" (about 145 habeas suits), *id.*, at 40, had been instigated *by* the state. By contrast, each inmate was then party to just one suit (the habeas proceeding he or she initiated), and thus no one of them faced *any* risk of "divergent" rulings until Ashmus took it upon himself to make every inmate a party to this second suit before a different court, a circumstance that shows his later demand for "uniformity" to be but the crudest form of bootstrapping. The state was (and remains) content to have all habeas-related litigation resolved in those courts before which each habeas suit is (and always had been) pending. It therefore ill behooves Ashmus—who, using self-styled techniques of case "consolidat[ion]," *id.*, at 39, undertook to remove litigation from scores of other courts into the one court *he* believed could "best resolve" Chapter 154's applicability, Record, Doc. No. 9, p. 3—to accuse *us* of forum shopping or bad faith. Neither should Ashmus deny that the injunction he sought, and which was issued and upheld on the explicit rationale that it prevents state officials from expressing a position we otherwise would be "free to assert," Pet. App. 20a, 77a-79a; see Resp. Br. 21-22, is a content-based, viewpoint-specific prior restraint of expressive freedom.

Finally, we plainly claim no "constitutional entitlement to divergent rulings," *id.*, 17, 28, nor do we demand access to "every courtroom in the land," *id.*, at 41. We simply seek the "'use of established adjudicatory procedures.'" See Br. for Pet. 42. Like Ashmus himself, we recognize the "significant" likelihood, Resp. Br. 40, that courts within the Ninth Circuit will, if given the chance, ultimately conclude that Chapter 154 neither imposes a time limit for appointing state counsel nor requires the elimination of all judicial discretion in the administration of counsel standards, and that, *as a matter of state law*, California's counsel standards are provided by "rule of court or statute" and no practice or procedure of the state supreme court precludes the presentation of potentially

meritorious collateral claims that "may exist outside the record." See Pet. App. 18a-20a.[10] The best chance for discovering the truth about California's compliance with Chapter 154 will occur after the injunction is lifted, this suit is dismissed, and established adjudicatory procedures are put to the task for which they are designed.

Conclusion

The judgment of the Court of Appeals should be vacated and the case remanded to that court with directions that the action be dismissed by the District Court.

Respectfully submitted,

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March 1998

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10. Ashmus asserts that "no state forum is available for resolving" Chapter 154's applicability. Resp. Br. 26, n. 13. Effective January 1, 1998, however, the California Supreme Court may answer questions of law certified to it by, inter alia, a federal appeals court, provided that an answer is requested, the question may be determinative of a pending cause, and there is an absence of controlling state precedent. Cal. Rules of Court, rule 29.5. As noted above, determining a state's compliance with Chapter 154 implicates several questions of *state* procedural law. If the Ninth Circuit sees fit to avail itself of the assistance Rule 29.5 now provides, see *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073-1075 (1997), it will likely gain a better understanding of California law than is reflected in its decision in this case.

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No. 97-391

In the

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OCTOBER TERM, 1997

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v.

TROY A. ASHMUS, *Respondent.*

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QUESTION PRESENTED

Did the Court of Appeals err in holding that this action, brought by California death-row prisoners against state officials seeking a preliminary injunction barring them from advocating that California met the requirements of Title 28, Chapter 154 for expedited filing and consideration of capital habeas corpus cases, was not barred by the Eleventh Amendment because it came within the *Ex Parte Young* exception?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

At stake in this case is the ability of each of the fifty states to fulfill its sovereign duty to enforce and protect its criminal judgments through good faith legal advocacy on the part of its Attorney General when those judgments are challenged in federal court on a petition for writ of habeas corpus.

The protection of its citizens through the enforcement of the criminal law is one of the primary sovereign duties of a state. In our federal system, of course, the constitutionality of state criminal judgments may be challenged in federal court on a petition for writ of habeas corpus. *E.g. Ex Parte Royall*, 117 U.S. 241 (1886). Accordingly, the states are often called upon to defend these judgments in federal court, which they do through advocacy by their respective Attorneys General.

At least as much as any other litigant, and perhaps more so in view of their special sovereign status and the subject matter at issue, the states and their citizens have a vital interest in the ability of their Attorneys General to advocate zealously on their behalf in such cases. In the present case, however, an Attorney General of a sovereign state has been enjoined from all good faith advocacy on a complex and highly debatable point of law potentially affecting federal review of a large number of capital convictions.

The interests of the *amici* states accord with those of the petitioners, the California Attorney General and prison officials, in seeking to overturn the injunction in this case, and to restore the Attorney General's ability to make all available legal arguments in defense of California's criminal judgments.

Amici also share a broader interest in this case. Failure to close the breach opened by the Ninth Circuit's expansive

interpretation of the "continuing violation of federal law" requirement of the *Ex Parte Young*, 209 U.S. 123 (1908), exception will undermine to a substantial degree important principles of Eleventh Amendment immunity. State officials could be compelled to respond in federal court to anticipatory claims that otherwise would not even be contemplated. The importance of the states' Eleventh Amendment immunity in our federal system requires that the *Young* exception's requirement of a continuing violation of federal law be construed strictly to insure that what are in reality suits against the states are permitted only where absolutely necessary to protect the supremacy of federal law. The decision of the Ninth Circuit strays far from this principle in holding that a state official violates federal law merely by asserting an intention to invoke an arguably meritorious defense to a potential federal law claim. In addition, the *amici* states have an interest in ensuring that in cases brought under *Ex Parte Young* federal courts award only such relief as is necessary and effectual.

Finally, Maryland and other *amici* death-penalty states also share the petitioners' interest in the implementation of the capital habeas corpus reforms enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, codified at 28 U.S.C. §§ 2261-2266 (Chapter 154). Whether these reforms will be applied depends on whether a state's system for providing counsel to capital prisoners on state collateral review meets the requirements of the statute. These *amici*, like California, have a compelling interest in being able to litigate this question as effectively as possible, which cannot be done where the Attorney General of a state may be placed under an injunction barring him from even asserting in any court that Chapter 154 applies.

STATEMENT OF THE CASE

On April 24, 1996, the effective date of the AEDPA, Respondent Troy Ashmus, a California prisoner under sentence of death, filed a complaint in the United States District Court for the Northern District of California. Named as defendants were the Attorney General of California, and three California prison officials having custody of that state's capital prisoners. On behalf of himself and other California capital prisoners, Ashmus sought a declaratory judgment that the accelerated filing and review provisions of the Act, codified in new Chapter 154 of Title 28, would not apply to them because California's system of providing counsel for capital prisoners on state collateral review did not meet certain requirements of the Act. *See* 28 U.S.C. § 2265. The District Court granted the relief sought, enjoining the state officials from further advocating in any forum their legal position that Chapter 154 applied. *Ashmus v. Calderon*, 935 F. Supp. 1048 (N.D. Cal. 1996).

On appeal by the state officials from the District Court's grant of preliminary injunctive relief, under 28 U.S.C. § 1292(a)(1), the Ninth Circuit Court of Appeals affirmed, finding that the exception of *Ex Parte Young* applied and thus rejecting the state officials' argument that the Eleventh Amendment barred the suit. The Ninth Circuit also agreed with the prisoners' position on the merits and found that the issuance of injunctive relief was proper to enforce the declaratory judgment. The district court's preliminary injunction was approved "under the current state of California law," this clarification being intended to account for the possibility that California might change its law. *Ashmus v. Calderon*, 123 F.3d 1199, 1209 (9th Cir. 1997).

This Court granted the state officials' Petition for Writ

of Certiorari on December 5, 1997.

SUMMARY OF ARGUMENT

Subject to very limited exceptions, the principles of sovereign immunity embodied in the Eleventh Amendment bar suits in federal court against the states. In the interest of protecting the supremacy of federal law, however, suits for prospective relief against state officials may be allowed under the decision in *Ex Parte Young* where necessary to end a continuing violation of federal law. The Ninth Circuit erroneously found the *Young* exception applicable in the present case so as to permit a highly intrusive injunction barring the state officials from lawful advocacy of their position that California meets the requirements for the applicability of Chapter 154's capital habeas reforms.

The *Young* exception does not apply here. No continuing violation of federal law exists in this case. State officials were merely taking a good-faith legal position on the applicability of a complex statute under circumstances arguably leaving California capital prisoners uncertain as to their best course of action. California officials violated no federal law, however, in taking the position that they did.

Their advocacy of the position that Chapter 154 applied also in no way deprived the prisoners of any federal rights. California capital prisoners are provided with counsel throughout the state unitary review process, which includes collateral review. Regardless whether Chapter 154 applies, the federal habeas corpus statute of limitations does not even begin to run until after the completion of the unitary review process, with the result that at the commencement of the federal habeas review process California capital prisoners will not be compelled to quickly file so-called "bare-bones" petitions or risk forfeiting their right to federal habeas review.

Absent any violation of federal law or threat to federally protected rights, no justification exists for the intrusion into state sovereignty represented by the maintenance of this action in federal court. This litigation has had a substantial impact on California's sovereignty. The state's Attorney General has been subjected to a coercive injunction barring him from advocating in any court on behalf of the citizens of the state in defense of the state's capital criminal judgments. Such an injunction represents a highly offensive intrusion on sovereignty.

The injunction was unnecessary and ineffectual, as well as excessive. Whatever legitimate interest in certainty was thought to be served by the injunction is better served by the *stare decisis* effect of appellate court rulings on the merits in individual cases, as developed in the ordinary course of litigation. The injunction is ineffectual in serving the certainty interest asserted. All it prohibits is the assertion of one party's legal position. The applicability *vel non* of Chapter 154 will remain a legal issue to be considered by California federal district courts hearing individual capital habeas petitions.

For all these reasons, the Ninth Circuit erred in finding the *Ex Parte Young* exception applicable and in extending federal jurisdiction to this case in the face of the state officials' Eleventh Amendment objections.

ARGUMENT

THIS ACTION DOES NOT COME WITHIN THE *EX PARTE YOUNG* EXCEPTION TO THE STATE'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

A. Introduction

1. Like the other forty-nine sovereign states of this Union, the State of California cannot ordinarily be sued by

its own citizens in federal courts without its consent. *Hans v. Louisiana*, 134 U.S. 1, 20 (1890).[1] Through prolonged and vigorous debate, this Court has consistently affirmed that this principle of sovereign immunity is an inherent part of our constitutional structure that is embodied in the Eleventh Amendment. *E. g., Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2033 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1122 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). Other than an express waiver by the state, or a clear abrogation of a state's immunity by Congress pursuant to the Fourteenth Amendment, *id.*, 473 U.S. at 238; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), neither of which is at issue here, the only exception to a state's Eleventh Amendment immunity is that provided by the decision in *Ex Parte Young*, 209 U.S. at 160.

The question in this case is whether *Ex Parte Young* applies so as to permit Ashmus's suit against the Attorney General of California and certain officials of California's prison system seeking injunctive relief to preclude the application to him and other condemned prisoners of the provisions of Title 28, Chapter 154 of the United States Code relating to capital habeas corpus petitions. The Ninth Circuit Court of Appeals held that the *Ex Parte Young* exception applied, and affirmed the District Court's ruling

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[1] This immunity normally extends to suits against state officials sued in their official capacity. Such suits are considered suits against the state itself, subject to the exception of *Ex Parte Young*, discussed *infra*, at p. 8. *See, e.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462-63 (1945).

on the merits and its award of injunctive relief. *Ashmus*, 123 F.3d at 1208-09.

The Ninth Circuit's decision was wrong. That court reflexively applied *Young* principally because Ashmus claimed a threat to his federally protected rights. In so doing, the Court of Appeals gave insufficient consideration to the purposes and limitations of the *Young* exception, especially considering the vaporous nature of the alleged violation of federal law and the highly intrusive, yet ineffectual, injunctive relief granted.

2. *Ex Parte Young* involved a suit against the Attorney General of Minnesota to enjoin enforcement of onerous criminal sanctions under a state statute setting railroad rates so low as allegedly to amount to an unconstitutional taking. This Court held the suit was not barred by the Eleventh Amendment. 209 U.S. at 160. *Ex Parte Young* has been relied on ever since to except from the scope of Eleventh Amendment immunity, "certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. at 2034. However, it is clear that *Ex Parte Young* does not apply to every suit against state officials for prospective relief. As this Court very recently stated in *Idaho v. Coeur d'Alene Tribe*:

> To interpret *Young* to permit a federal court-action to proceed in every case where declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation of a federal court's federal-question jurisdiction. The real interests

> served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

117 S. Ct. at 2034.

Applying this reasoning, the Court held that the *Young* exception would not apply to permit a suit against state officials that was in essence a suit against the state itself to quiet title to land, "which implicates special sovereignty interests." 117 S. Ct. at 2040, 2043. This Court also declined to apply *Young* in *Seminole Tribe of Fla. v. Florida*, where to do so would have permitted a suit to enforce Florida's obligation to negotiate with an Indian tribe under the Indian Gaming Regulatory Act. The Court characterized the case before it as "sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the applicability of that doctrine." 116 S. Ct. at 1132.

That there are fundamental limitations on the scope of the *Young* exception has been clear at least since *Edelman v. Jordan*, 415 U.S. 651, 666 (1974), in which this Court held that the relief available in an *Ex Parte Young* action is limited to prospective relief. The primary reason for this basic limitation is not that such a limitation is implicit in the rationale of *Ex Parte Young*, but because it is the necessary result of balancing the states' sovereignty interests with the need to protect the supremacy of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).[2] *See also Pennhurst State*

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[2] In *Green*, this Court stated: "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but

School & Hospital v. Halderman, 465 U.S. 89, 102-03 (1984)(holding *Young* exception does not permit suit in federal court to redress violations of state law; noting that although *Young* "has survived," it has "not been provided an expansive interpretation.").

Indeed, it has long been settled that the *Ex Parte Young* exception only applies in limited situations, where an exception to the Eleventh Amendment is "absolutely necessary" to protect the supremacy of federal law. *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926), *quoted in Younger v. Harris*, 401 U.S. 37, 45 (1971).

In short, *Ex Parte Young* does not automatically apply simply because the complaint alleges a violation of federal law and requests prospective relief. This Court's decisions, suggest that what is required is a careful inquiry into: 1) the nature of the alleged violation as to which federal law is sought to be vindicated, i.e., is a substantial violation of federal law alleged? 2) the impact on the sovereignty interests of the state, i.e., is the relief sought justified in light of the particular intrusion into state sovereignty? and 3) the nature and scope of the relief sought, i.e., will the relief sought be effective to end the allegedly continuing violation thereby vindicating the supremacy of federal law without unnecessarily infringing on the state's sovereignty?

All of these considerations are implicit in the formulation of the *Young* exception itself in light of its

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the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." 474 U.S. at 68 (citations omitted).

purposes and the limitations which pervade its constitutional context. As Justice Powell stated for the Court in *Pennhurst*:

> Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. . . .
>
> The Court has also recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.

465 U.S. at 105. The decision of the Ninth Circuit either ignored these considerations or evaluated them incorrectly based on a presumption that *Young* would automatically apply.

B. There was no violation of federal law to be remedied in this case.

The first and most fundamental requirement for the application of the *Young* exception is a substantial continuing violation of federal law by state officials that the prospective relief sought is designed to end. Where there is no ongoing violation of federal law to be stopped, there is no justification for infringing on the sovereignty of the state. *See, e.g., Green v. Mansour*, 474 U.S. at 72-73.

In the present case, the Ninth Circuit properly acknowledged the requirement of a continuing violation of federal law. However, the court purported to find such a continuing violation of federal law in the mere assertion by state officials that they believed the provisions of Chapter 154 applied even though California's unitary system allegedly did not meet the requirements of § 2261(b), (c) or 2265. This was held to violate the prisoners' rights to habeas corpus review. *Ashmus*, 123 F.3d at 1204-05.

Read in the best light, the Ninth Circuit's conclusion was that the state's assertion of the applicability of Chapter 154 in the prisoners' upcoming habeas cases, placed these presumptively unrepresented death-row inmates in a Catch-22: they could either anticipate the state's Chapter 154 defenses and file a timely, but substantively deficient petition without the benefit of counsel, or they could take their chances on the applicability of Chapter 154, await the appointment of counsel and file a substantively complete but potentially untimely petition. The Ninth Circuit's conclusion was wrong legally and factually.

First, the Ninth Circuit's decision is fundamentally wrong legally. By no stretch of the imagination can the state officials' mere announcement of a good faith intention to raise legal defenses provided under Chapter 154 to the prisoners' anticipated habeas corpus petitions be considered a violation of federal law of any kind, much less of the kind sufficient to justify invocation of the *Young* exception to the Eleventh Amendment. *See Booth v. State of Maryland*, 112 F.3d 139, 143 (4th Cir. 1997). *Cf. Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-99 (1937)(*Young* not applicable to permit interpleader actions against states claiming right to tax decedent as domiciliary on theory that suit necessary to prevent violation of federal right to avoid double taxation). *See also Cory v. White*, 457 U.S. 85, 86 (1982). Certainly, a cause of action does not exist merely to resolve uncertainty in the application of law. *See Younger v. Harris*, 401 U.S. at 42.

The Ninth Circuit's decision attempts to avoid these common sense truths by framing the issue as if the state officials were asserting an intention to raise Chapter 154 defenses despite the clear inapplicability of Chapter 154. *Ashmus*, 123 F.3d at 1204. However, the record is devoid of any claim, evidence or finding that the state officials were

acting in bad faith in stating their position concerning Chapter 154. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965)(permitting injunctive action to restrain threatened prosecution alleged to be in bad faith). More fundamentally, this analysis collapses from internal contradiction. If, in fact, it were clear Chapter 154 did not apply to California, the prisoners would not be under any compulsion to meet its accelerated filing deadlines, no matter how forcefully the state asserted an intention to advance its defenses. If the applicability of Chapter 154 is sufficiently debatable that the prisoners feel compelled to meet its deadlines, in case it should be found to apply, there can be nothing unlawful about the state officials' asserting that they will raise Chapter 154 as a defense.

The Ninth Circuit's holding that state officials violate federal law by simply announcing an intention to rely on allegedly inapplicable defenses could have far-reaching, adverse consequences. Under the Court of Appeals' rationale, the *Ex Parte Young* exception could be relied upon in other types of anticipatory suits against state officials seeking to foreclose anticipated federal law defenses to potential actions, at least wherever the plaintiff alleges that the uncertainty caused by the prospect of a successful defense may cause him to forego some asserted federal right. For instance, a convicted state prisoner, before filing for state collateral review, might seek a federal court ruling on the merits of a constitutional claim that a confession was involuntary by suing state officials for an injunction to prevent them from arguing the contrary. Potential 42 U.S.C. § 1983 plaintiffs might sue for a declaratory judgment to establish that the defense of qualified immunity would not be available. A welfare recipient contemplating an administrative claim for back benefits could attempt to foreclose state officials from

contesting his claim by contending that he was ineligible.

That such suits would be few cannot be assumed, given the many federal programs administered by state officials and the creativity of the bar. And although core jurisdictional and equitable principles might readily trim back novel claims growing out of the Ninth Circuit's decision in *Ashmus* once they arise, there are Eleventh Amendment interests at stake that caution against planting the seeds in the first place.

This Court has repeatedly rejected the notion that a state loses its Eleventh Amendment protections simply by participating in a federally funded program, such as AFDC, *see, e.g., Atascadero*, 473 U.S. at 246; *Edelman*, 415 U.S. at 673, or simply because issues of federal law are at stake, *e.g. Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322 (1933). Treating the assertion of a defense as a violation of federal law would invite an end-run around these strict rules. The Court has also recognized that the Eleventh Amendment protects the states not just from being subject to the judgment of a federal court without their consent, but also from the interference of being brought into federal court on the complaint of private parties. *See, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Finding a violation of federal law wherever an arguably invalid defense is asserted could subject the states to the need to respond to many more lawsuits in federal court.

Important Eleventh Amendment immunity principles are therefore threatened by the Ninth Circuit's expansive interpretation of the "continuing violation of federal law" requirement of the *Young* exception. To preserve the constitutional role of the states' Eleventh Amendment immunity in our federal system requires that the *Young*

exception be narrowly applied. Such suits are proper only where truly necessary to protect the supremacy of federal law. Therefore, the *Young* exception must be applied only where there is a real "continuing violation of federal law," and not, as in this case, where there is only a good-faith assertion of a potential legal defense.

In addition to the foregoing legal error, the Ninth Circuit was wrong on the facts. As persuasively argued in the Petition for Writ of Certiorari filed by the California state officials and the Brief of Amicus Curiae Criminal Justice Legal Foundation in Support of the Petition for Writ of Certiorari, California death row inmates are simply not placed in the Catch-22 the Court of Appeals envisioned. California has a unitary system of post-conviction review, in which collateral review and direct review proceed simultaneously. *See Ashmus v. Calderon*, 935 F. Supp at 1070 (decision of district court below describing California's unitary review system). Regardless of any delay in initial appointment, counsel is provided for capital prisoners for this process. The federal habeas corpus time clock, whether 180 days under § 2263 or one year under § 2244(d), does not even begin to run until the unitary review process has been completed.

The real source of the Catch-22 the Ninth Circuit feared was not delay in the appointment of state unitary review counsel, but delay in the appointment of counsel to prepare a prisoner's federal habeas corpus petition after the federal habeas corpus clock has started to run. But any such delay is not the responsibility of the state officials. Counsel in federal habeas corpus cases are appointed by the federal courts. 21 U.S.C. § 848(q); *McFarland v. Scott*, 512 U.S. 849, 854 (1994). Likewise, it has nothing to do with any delay or other infirmity in the appointment of counsel for state unitary review proceedings that allegedly renders

California ineligible under Chapter 154. Finally, as a matter of practicality, delay in the appointment of federal habeas corpus counsel would be rendered harmless in any event by the fact that before the federal habeas clock even starts to run, state unitary review proceedings would have been completed with the assistance of counsel. These proceedings would have included a thorough review of all collateral issues that could immediately be translated into a substantive federal habeas corpus petition.

In sum, because the alleged "continuing violation of federal law" in this case was non-existent in fact, and was at best, theoretical only, no intrusion on state sovereignty was warranted to vindicate the supremacy of federal law.

C. The intrusion into state sovereignty in this case was significant.

In *Idaho v. Coeur D'Alene Tribe*, 117 S. Ct. at 2040, this Court closely examined the impact of the challenged law-suit on the sovereignty of the state before deciding that *Ex Parte Young* did not extend far enough to permit the action. Likening the suit to an action to quiet title to land, implicating core issues of sovereignty, the Court noted that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable." 117 S. Ct. at 2043.

Obviously, the present case does not involve a question of jurisdiction over state lands and waters. But, like *Idaho*, the present case does involve core state functions which raise important issues of federalism: the enforcement of criminal law, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983), and the ability of a state's chief lawyer to

advocate for the enforcement of the state's criminal judgments in conformance with his constitutional duty, *see Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

The present action directly infringes on the sovereignty of the State of California in both of these important areas. Certainly, the impact on the state's sovereignty in this case is far greater than that which occurred in *Edelman*, where state welfare officials were simply compelled to conduct a federally funded program in accordance with federal mandates. It is not contended, of course, that *Ex Parte Young* is categorically inapplicable in the present case due to the nature of the effect on state sovereignty. *Young* itself involved an injunction to prevent a state's attorney general from enforcing the state's criminal law. But, on the facts of that case, such an action was necessary to vindicate constitutional rights.

Despite the importance of the state's sovereignty concerns, the Ninth Circuit dismissed the state's assertions of its sovereign interests as matters "of timing, not of substance," and found them trivial simply because the issue sought to be resolved in this case could be resolved in litigation of individual habeas corpus petitions. *See Ashmus*, 123 F.3d at 1205 ("Permitting this action to proceed despite California's Eleventh Amendment immunity defense ... will have little, if any, impact on the State's sovereign interests.").[3] The Ninth Circuit's decision in this regard

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[3] The Ninth Circuit also cites a section of Justice Kennedy's *Idaho* opinion that was not part of the opinion of the Court for the proposition that "efficiency and fairness concerns" affect the determination whether to apply *Young*. *Ashmus*, 123 F.3d at 1205-06, *citing Idaho*, 117 S. Ct. at 2306. *Amici* believe the Ninth Circuit misread this separate portion of the opinion. Justice Kennedy did not assert that concerns of judicial economy

mistakenly equates the adverse impact of a particular lawsuit on a state's sovereignty interests with the question whether the same legal questions could legitimately be raised in another way. Here, the fact that California could be forced to defend its criminal judgments in one or more habeas corpus actions in which the question of Chapter 154's applicability may be raised, does not mean that California has no sovereignty interest in avoiding an additional, preliminary coercive lawsuit addressing this issue.

The Ninth Circuit's decision also ignores the broad scope of the injunction it affirmed, which prohibits the California Attorney General in any capital habeas case from advocating that Chapter 154 applies. No such limitation would follow under principles of *stare decisis* even if California were to lose the issue of Chapter 154's applicability on the merits in litigation of an individual habeas petition. The Attorney General would be free in subsequent cases to argue the inapplicability of the prior rulings on a variety of grounds, to the extent the trial court permits, and at least to preserve the issue for appeal.

In sum, this suit and the injunctive relief awarded, barring the state's officers from good faith legal advocacy in the state's interest, represent a severe intrusion on the sovereignty of the state, especially when compared to the absence of any real alleged "violation of federal law."

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can override Eleventh Amendment immunity. The Court has stated: "Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity." *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986)(dealing with federal government's immunity from interest on judgment), *quoted in Booth v. State of Maryland*, 112 F.3d at 146.

D. The injunctive relief awarded in this case was excessive, unnecessary and ineffectual for the intended purpose.

The concerns of federalism inherent in the notion that the Eleventh Amendment embodies our constitution's recognition of broad sovereign immunity for the states dictate that a court be particularly cognizant of traditional equitable principles, *see, e.g., Younger v. Harris*, 410 U.S. at 42-43; *Samuels v. Mackell*, 401 U.S. 66, 73 (1971); *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952), in determining what relief is permissible in an action brought under the *Young* exception. Those traditional equitable principles were ignored by the Ninth Circuit. The injunction it affirmed was unnecessary, excessive and ineffectual. Ashmus's complaint requesting such relief should not have been permitted to proceed past the barrier of the Eleventh Amendment.

The only attention given by the Ninth Circuit to the question of the propriety of the injunctive relief it was affirming was to say: "Nor did the district court err in determining that an injunction was necessary to effectuate its declaratory judgment. Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case." *Ashmus*, 123 F.3d at 1209.

While it is true that the Declaratory Judgment Act provides that a court may issue injunctive relief where necessary to effectuate a declaratory judgment, 28 U.S.C. § 2202, injunctive relief certainly does not follow a declaratory judgment as a matter of course. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974)(recognizing propriety of injunctive and declaratory relief subject to different standards; holding error to deny declaratory relief solely

because injunctive relief unavailable in absence of showing of irreparable injury). Thus, even if declaratory relief were proper in this case, which is not conceded, it by no means follows that the injunction was proper.

The preliminary injunction here, even as clarified by the Ninth Circuit, *Ashmus*, 123 F.3d at 1209, was not proper relief in a case brought under the *Young* exception because it was at the same time overly intrusive, unnecessary and ineffectual to accomplish its intended purpose. As restated by the Ninth Circuit, the injunction provided "that California is enjoined from asserting in any state or federal court that it qualifies for the benefits of Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death." *Id.*[4]

First, in prohibiting the state's Attorney General from advancing good faith legal arguments in court proceedings in which he has a constitutional duty to defend the state's interest, the injunction represents an obvious and significant intrusion on the sovereignty of the state. Such an intrusion would have to be considered grossly excessive if not absolutely necessary and effectual.

This injunction cannot even be considered necessary, however. The only purpose to be served by it is to relieve California death row prisoners of uncertainty whether Chapter 154 will apply to their future habeas petitions. The only significant difference such fore-knowledge would

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[4] Interestingly, the Ninth Circuit has dropped the pretense that the injunction is against the defendant state officials, not the state itself. Regardless of the applicability of the *Young* exception to a suit against state officials, a suit against a state itself is still barred under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. at 1132.

make would be to allow the prisoners an extra six months to file their petitions. As argued above, *see supra* at 15-16, this extra six months is unnecessary. The prisoners would have been represented by counsel throughout the preceding unitary review process, during which all collateral issues that could be raised on federal habeas would have been explored. An additional six months would not be necessary to draft a substantive habeas corpus petition.

Finally, assuming the intent of the injunction is to relieve the prisoners of uncertainty whether Chapter 154 applies, it is ineffectual. The injunction itself does nothing to resolve the issue of the applicability of Chapter 154; it simply prevents state officials from speaking on that issue. *Cf. Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35 (3d Cir. 1997)(court accepts Pennsylvania officials' declaration that requirements of § 2261 not met). Of course, federal district courts in California will be bound by the ordinary *stare decisis* effect of the *Ashmus* decision, but the same would have been true following a decision on the merits in any single habeas corpus case without resort to a coercive injunction barring advocacy of the state's interest by the Attorney General.

The injunction *per se* also does not preclude a district court itself from raising questions of the applicability of Chapter 154 in the course of deciding individual habeas corpus petitions. Indeed, each federal district court hearing a California capital habeas petition would be duty bound to determine what law applied, within the limits of the doctrine of *stare decisis*, regardless of what position the parties take. Thus, at least some degree of uncertainty must remain in spite of the injunction. In these circumstances, the supposed benefits flowing from the Ninth Circuit's "remedy" do not justify the substantial intrusion on California's sovereignty interests that it represents. Such a

remedy is not proper under the *Ex Parte Young* exception to the Eleventh Amendment.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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